

University of Missouri-Kansas City School of Law

UMKC School of Law Institutional Repository

The Reports of Sir Edward Coke

Leon E. Bloch Library Sir Edward Coke
Collection

1727

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

Sir Edward Coke

Follow this and additional works at: https://irlaw.umkc.edu/coke_reports



Part of the [Law Commons](#)

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

The King's ATTORNEY GENERAL,
O F

Divers Resolutions and Judgments given upon solemn Arguments, and with great Deliberation and Conference of the most Reverend Judges and Sages of the LAW, of Cases difficult, in which are great Diversities of Opinions, and which were never resolved or adjudged, or reported before: And the Reasons and Causes of the said Resolutions and Judgments.

Published in the first Year (the Spring-Time of all Happiness) of the most happy Reign of the most High and most Illustrious JAMES King of England, France and Ireland, and of Scotland, the 37th, 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 Ancient as Modern.

Abominables Regi qui agunt impie, quoniam Justitia firmat solium.
PROVERB. 16. 12.
Voluntas Regis labia justa, qui recta loquitur diligetur.
PROVERB. 16. 13.
*Custodi innocentiam, & vide aequitatem, quoniam sunt reliqua homini
paucifera.*
PSAL. 37. 37.

In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING,
(Assigns of *Edward Sayer*, Esq;) for D. BROWNE,
J. WATTHOE, B. LINTOT, R. GOSLING, W. BEARS,
T. WARD, W. JINYS, J. OSBORN, J. HOOKE,
T. WOODWARD, F. CLAY, T. WOOTON, R. WILLIAMSON,
and A. WARD. M.DCC.XXVII.

T O T H E

R E A D E R.

Nihil plane est qd' de Legibus dici aut scribi potest (licet spaciosus sit ille campus, & argumentum pene infinitum) quod mea quidem sententia ad sex Capita, de iisdem, vidl't, Condendis, Corrigendis, Dirigendis, Exponendis, Addiscendis, & Observandis nequeat reduci. In Condendis vero Legibus, sex sunt quæ inter alia veniunt precipue consideranda. Ac primum quidem ipsius in qua feruntur *πρασίων* forma, quando alia ratio sit ubi regimen est Monarchium, alia ubi aristocraticum, ubi democra-

THere is nothing that can be said or written of Laws, although the Field be large, and the common Place thereof may seem to be infinite; but in mine Opinion may be reduc'd to one of these Six Heads, Making, Correcting, Digesting, Expounding, Learning, and Observing. Of Laws, concerning Making of new, Six Things amongst many other do principally fall into Consideration. First, under what Form of Commonwealth the Lawmakers be governed; for one Consideration is requisite where the Government is Monarchical, another

To the READER.

when it was Aristocratical, and a Third when it is Democratical. Secondly, to know the several Kinds of the Municipal Laws of his own proper Nation: For the Innovation or Change of some Laws is most dangerous, and less Peril in the Alteration of others. Thirdly, to understand what the true Sense and Sentence of the Laws then standing is, and how far forth former Laws have made Provision in the Case that falleth into Question. Fourthly, by Experience to apprehend what have been the Causes of the Danger or Hindrance that hath fallen out in that particular to the Commonwealth, either in respect of Time, Place, Persons or otherwise. Fifthly, to foresee that a proportional Remedy be applied so, as that for curing of some Defects past, there be not a stirring of more dangerous Effects in future. Sixthly, the mean, and that only is by Authority of the high (that in Troth is the highest) Court of Parliament. Concerning the Correction of old, the same Respects are to be observed, that have been said touching the Making of new. For Digesting of former Laws into Method and Order, Three Things are requisite: Judgment to know them, Art to dispose them, and Diligence

ticum rursus alia. Alterum vero est legum municipalium, quæ nationi illi propriæ sunt, in singulis suis generibus certa cognitio, quandoquidem periculosa magis sit harum quam illarum Legum sive antiquatio, sive innovatio, sive denique immutatio. Tertium est, ut verum sensum atque sententiam illarum legum quæ tum obtinent, necnon quousque Leges superiores causæ controversæ prospexerint teneamus. Quartum, ut rationes periculi aut damni, si quid in illo casu reipublicæ acciderit, respectu temporis, loci personarum, aut undecunque alias, experientia assequamur. Quintum, diligens cautio est, ut remedium aptum atque commodum sic adhibeatur, ne dum aliquibus malis præteritis mederi cupimus, futura alia longe periculosiora exitemus. Ultimum est legum ferendarum medium, quod totum in magnæ illius & supremæ sane curiæ Parliamenti autoritate positum est Legum antiquarum emendationis quod attinet, eadem plane cautiones observandæ sunt, quas incondentis novis supra attigimus. Ad Leges

To the READER.

nio, experientia predictis antiquitus usurpatas atque approbatas. Nolo hic commemorare Lorensum illud in magna Græcia decretum sane asperum, in eos latum qui novit rebus studentes, legem aliquam novam atque inauditam rogarent: Apud *Justinianum* in glossa ad primum librum institutionum lectu est, & vereor ut huic ætati acefcat plus satis: Rationem tantum illius decreti sic habere, *Quia Leges figendi & refigendi consuetudo est periculosissima.* *Platonis* vero legem de hac re recitabo, que habetur apud cum 6 de Legibus: *Si quis Civis nondum quid & inauditum invenerit, illud ad decennium in suis ædibus inventor exerceat, hoc sine, ut si utile probetur inventum profit auctori, sin vero malum, ipsi soli, non reipublice noceat.* Probo etiam & edictum illud a *Suetonio* relatum, videlicet: *Que præter consuetudinem & morem majorum fiunt, neque placent, neque recta videntur.* Atque sane discupetem *Honorii & Arcadii* institutum illud a nostratibus observari, nimirum; *Nos fidelissima vetustatis retinendus est: Sentio denique & concludo rem hanc Periandri*

End that if the Invention be good, it shall be profitable to the Inventor, and if it were nought, he himself, and not the Commonwealth might taste of the Prejudice. And I like well the Edict reported by Suetonius; quæ præter consuetudinem & morem majorum fiunt, neque placent, neque recta videntur. And I would the Commandment of Honorius and Arcadius were of us Englishmen observed, Nos fidelissima vetustatis retinendus est: And I agree and conclude this Point with the Apothegy of Pereander of Corinth, that old Laws and new Meats are fittest for us. As concerning the Correcting of the Common Laws, or antient Customs of England, may be applied all that hath been said concerning making of Laws: Only this add; That it hath been an old Rule in Policy and Law, that Correctio Legum est evitanda. And yet concerning certain of our Penal Statutes, to repeal many that Time hath antiquated as unprofitable, and remain but as Snares to intangle the Subjects with all; and to omit all those that be repealed, that none by them be deceived, as for Example concerning Drapery, or such like. To make one plain and

per.

To the READER.

Leges vero superiores in methodum atque ordinem dirigendas, tria requiruntur; Judicium ad eas cognoscendas, ars ad disponendas, denique diligentia ad complectendas singulas ne quæ omittatur. Legum expositio ordinarie quidem reverendos Judices regni que sapientes spectat, in maximis vero difficilimisque causis supremum parliamenti judicium. De addiscendis Legibus earumque scientia assequenda in præfatione ad primum meum Librum paucula attigi. Legum observatio omnes quidem in genere respicit, præcipue vero ac speciatim nonnullos, ut postea annotabitur, nam summa sequar fastigia rerum. Status hujus Regni monarchicus est, & originis jure hæreditario in hærenter successivus: Absolutissima sane perfectissimaque πολιτικῆς forma, utpote quæ interregnum atque infinita simul incommoda penitus excludat. Habetur enim in communi jure axioma, *Regem Angliæ nunquam mori*: Quod sane verum est respectu perpetuo durantis, & nunquam morientis politicæ capacitatis. Leges hic in Angliâ tripartitæ; jus

to omit none of them The Expounding of Laws doth ordinarily belong to the Reverend Judges, and Sages of the Realm: And in Cases of greatest Difficulty and Importance to the high Court of Parliament: Concerning Learning, and attaining to the Knowledge of these Laws, I have in the Preface of my first Edition somewhat touched. The observing of Laws doth concern all whatsoever; but principally some in particular, as hereafter shall be touched, for Summa sequar fastigia rerum. Our Kingdom is a Monarchy Successive by inherent Birth-right, of all others the most absolute and perfect Form of Government, excluding Interregnum, and with it infinite Inconveniences; the Maxim of the Common Law being, that the King of England never dieth, which is true in respect of the ever during, and never dying Politick Capacity. The Laws of England, consist of Three Parts, the Common Law, Customs, and Acts of Parliament: For any fundamental Point of the antient common Laws and Customs of the Realm, it is a Maxim in Policy, and a Trial by Experience, that the Alteration of any of them is most dangerous; for that which

To the READER.

hath been refined and perfected by all the wisest Men in former Succession of Ages, and proved and approved by continual Experience to be good and profitable for the Commonwealth, cannot without great Hazard and Danger be altered or changed. Infinite were the Scruples, Suits, and Inconveniencies that the Statute of 13 E. 1. de Donis conditionalib' did introduce, which intended to give every Man Power to create a new found Estate in Tail, and to establish a perpetuity of his Lands, so as the same should not be aliened nor letten, but only during the Life of Tenant in Tail, against a fundamental Rule of the Common Law, that all Estates of Inheritance were Fee-simple; whereupon these Inconveniencies insued, Purchases defeated, Leases evicted, other Estates and Grants made upon just and good Consideration were avoided, Creditors defrauded of the just and due Debts, Offenders imboldned to commit capital Offences, and many other Inconveniencies followed: Also, what Suits and Troubles arose by the Statute of cap. 34 Ed. 3. of Nonclaime, enacted against a main Point of the Common Law, whereby insued the universal Trouble of the K's Subjects, as it was resolv'd in Par-

commune, Consuetudines, ac decreta Comitiorum: Jam principia atque fundamenta Juris communis & consuetudinem regni quod attinet, axioma politicum est, usu atque experientia ratum, periculosissimam esse uniuersumque eorum alterationem: Qd' enim a sapientissimis olim viris longa ætatum serie politum ac perfectum est, inde vero assidua experientia bonum atque utile reipublicæ probatum & approbatum, illud sine magno periculo ac discrimine mutari aut alterari nequit. Infiniti fuerunt scrupuli, lites, & incommoda ex statuto, 13 E. 1. De Donis conditionalibus, introducta: ubi cautum fuit ut penes unumquemque esset recens excogitatum jus taliatum, hoc est limitatum, incisum, aut restrictum creare; terrarum insuper suarum perpetuitat' quandam stabilire, adeo ut neque alienari, neque locari, nisi durante naturali vita tentis illius (ut loquimur) taliati possent: Atque hoc contra fundamentale principium Juris communis, videlicet, quod hereditatum jus omne per feudum simplex transfiret: Unde incommoda hæc aliaque plurima sequuta sunt, emptores

To the READER.

res defraudati, locationum formulæ evictæ, status alii atque donationes æquis bonisque rationibus concessæ penitus frustratæ, emuncti argento creditores, fontes ad capitalia flagitia perpetrande animati. Adhæc cuius etiam vel mediocriter instituto apparet, quæ lites, quantæ turbæ, ex statuto illo ortæ sunt: c. 34. Ed. 3. cui titulus *de non reposcendo*, nob' *Non claime*, lato contra Juris communis præcipium fundamentum; unde tot molestiæ subditis exhibitæ velut in Comitibus illis, 4 H. 7. cap. 24. conclusum ac definitum est. Quam vero subtiles ac spinosæ quæstiones indies pullularunt de validitate atque interpretatione testamentorum quibus datæ sunt terrarum hæridates, quæ tamen jure communi, ante statuta testamentaria, 32 & 34 Hen. 8. legari non poterant, quotidiana experientia clare docet, ad multorum quidem ruinam, plurimorum vero damnum ac detrimentum. Atque præ cæteris, recentes qued' inventiones ac commenta, in satisfatione firmandisque terrarum possession', per limitation' quorundam usum, sub nominis & fanaticis cautioni-

liament in 4 H. 7. cap. 24. is apparent to all of least Understanding: What intricate and subtle Questions in Law daily arose upon the Validity and Construction of Wills of Lands, which by the Rule of Law were not devisable before the Statutes of 32 & 34 H. 8. of Wills, daily Experience to the Ruin of many, and Hinderance of Multitudes manifestly teacheth. But above all, certain late Inventions and Devises in Assurances of Lands by Limitation of Uses, under Upstart and wild Provisoos and Limitations, such as the Common Law never knew, do breed and multiply infinite Troubles, Questions, Suits, and Difficulties: In the Parliament holden in the 20 Year of King Henry III. it was moved that Children born before Marriage (being Bastards by the Common Laws of this Realm, the Wisdom of the Law abhorring clandestine Contracts) might be legitimate according to the Civil or Ecclesiastical Laws, whereunto saith the Statute, Omnes Comites & Barones una voce responderunt, Nolumus leges Angliæ mutare quæ hucusque usitatæ sunt & approbatæ: In which few Words is observable, first, the absolute Concord and Unity, una voce, of all the Peers

To the R D A E E R.

and Lords of Parliament : Secondly the Denial, Nolumus leges Angliæ, not of Normandy, or of any other Nation, as is fondly dreamed, as elsewhere I have shewed, but the Common Law of England : And thirdly, the Reason of their Denial : Quæ hæcenus usitatæ sunt & approbatæ, as if they should have said, we will not change the Laws of England, for that they have been anciently used and approved from Time to Time by Men of most singular Wisdom, Understanding, and Experience. I will not recite the sharp Law of the Locrenses in Magna Græcia, concerning those that sought Innovation in preferring any new Law to be made, you may read it in the Gloss of the first Book of Justinian's Institutes, because it is too sharp and tart for this Age : But take we the Reason of that Law, Quia leges figendi & refigendi consuetudo est perniciofa. But Plato's Law I will recite touching this Matter, which you may read in his 6th Book de Legibus ; if any Citizen do Invent any new Thing, which never before was read or heard of, the Inventor thereof, shall first Practice the same for the Space of 10 Years in his own House, before it be brought into the Commonwealth, or published to the People, to the

bus; quas ne novit quidem jus nostrum, infinitas plane turbus, quæstiones, lites, ac difficultates & pariunt, & multiplicant. In comitiis habitis Anno 20 Hen. 3. propositum & rogatum est, ut liberi ante matrimonium nati (quos omnes Jus nostrum commune (prudenter quidem abhorrens a clandestinis nuptiis) habet pro spuris) ex instituto juris Civilis aut Ecclesiastici, fierent legitimi; Cui (inquit Lex) omnes Comites & Barones una voce responderunt, Nolumus Leges Angliæ mutare, quæ hucusque usitatæ sunt & approbatæ. In quibus verbis (numero sane paucis) observari potest. 1. Absoluta concordia atque unitas, una voce, omnium, scilicet, Comit' & Baronum in Comitiis. 2. Negationis forma, Nolumus Leges Angliæ, non Normanniæ, aut alterius cujusvis Nationis, ut nonnulli imprudenter somniant (sicut alibi ostendemus) sed Jus Commune Angliæ. 3. Negationis ratio, videlicet, quæ hæcenus usitatæ sunt & approbatæ : Ac si dixissent, Nolumus mutare Leges Angliæ, utpote de tempore in tempus a viris singulari prudentia, ingenio,

To the READER.

perspicuous Law divided into Articles, so as every Subject may know what Acts be in Force, what repealed, either by particular or general Words, in Part, or in the Whole, or what Branches and Parts abridged, what enlarged, what expounded: So as each Man may clearly know what and how much is of them in Force, and how to obey them, it were a necessary Work, and worthy of singular Commendation: Which his Majesty out of his great Wisdom and Care to the Commonwealth, hath commanded to be done: For as they now stand, it will require great Pains in reading over all, great Attention in observing, and greater Judgment in discerning upon Consideration of the Whole, what the Law is in any one particular Point: But with this Caution that there be certain Statutes concerning the Administration of Justice, that are in Effect so woven into the Common Law, and so well approved by Experience, as it will be no small Danger to alter or change them: And herein, according to his Royal Commandment (God willing) somewhat in due Time shall be performed. For bringing of the Com. Laws into a better Method, I doubt much of the Fruit of that Labour.

Corinthii illo Apothegmate; *Antiquis Legibus, & ceteris recentibus utendum esse.* Juris vero Communis & consuetudinum Angliæ antiquar' emendation' qd' attinet eo referatur quicquid de condendis Legibus dictum est; unum id addas, receptam olim fuisse cum in reipublicæ administratione, tum in jurisprudentia, regulam, quod correctio Legum est evitanda Operæ precium tamen interia esset, & singulari laude dignum, ex Statutis nostris pœnalibus multa rescindere atque abrogare, quæ diuturnitas temporis tamquam inutilia antiquavit, & subditis tantum illaqueandis inserviunt: Ea item omnia omittere que jamdudum abdicata sunt, ne quis illis fallatur, veluti de Pannaria, aut consimilibus; unum denique idque perspicuum juris quasi corpus condere, ita in articulos distributum, ut quivis subditus intelligat, quæ Statuta obtineant, quæ abrogentur, sive specialibus sive generalibus verbis, vel in parte, vel in toto; tum etiam quæ membra aut partes restringuntur, quæ dilatantur, quæ exponuntur; ita ut cuivis pateat quid quan-

To the READER.

quantumque in iis valeat, atq; tum illa quid jubeant, tum hic quomodo pareat; id quod Ma. Regia pro singulari ejus prudentia atque cura erga rempublicam jussit fieri: Nam ut se nunc habent statuta, requirent profecto & in perlegendō ingentem operam, & in observando magnam intentionem, maximum vero in discernendo judicium, ut dum quis omnia pensitet, quid Lex sit vel in uno aliquo articulo clare pronunciet. Hic tamen monerite volo, esse quædam Statuta quæ justitiæ administration' respiciunt, ita Juri communi intertexta & involuta, adeoque experientia ipsa comprobata, ut periculosum plane esset & convellere aut immutare: Verum hac quidem in re ex mandata Regio siquidem Deus dederit) opportuno tempore aliquid fiet. Quod vero ad reductionem Juris Communis in commodiorem Methodum attinet, de illius laboris fructu plurimum dubito, illud scio, quod compendii in multis quidem scientiis authoribus ipsis profuerunt, verum aliis (præsertim ut nunc usurpantur) non mediocri-

This I know, that Abridgments in many Professions have greatly profited the Authors themselves; but as they are used, have brought no small Prejudice to others: For the advised and orderly Reading over of the Books at large in such manner as elsewhere I have pointed at, I absolutely determine to be the right Way to enduring and perfect Knowledge, and to use Abridgments as Tables, and to trust only to the Books at large: For I hold him not discreet that will Sectari rivulos, when he may petere fontes. And certain it is, that the tumultuary reading of Abridgments, doth cause a confused Judgment, and a broken and troubled Kind of Delivery or Utterance: But to reduce the said penal Laws into such Method and Order, and with such Caution as is above said (which cannot be done but in the high Court of Parliament, nor without the Advise of such as before is touched) were an honourable, profitable and commendable Work for the whole Commonwealth. This 4th Part of my Reports doth concern the true Science and Exposition of the Laws in divers and many Cases, never adjudged or resolved before: Which for that they may in mine Opinion tend to
the

To the READER.

the general Quiet and Benefit of many, the only End (God knoweth) of the Edition of them; I thought it a Part of my great Duty that I owe to the Commonwealth not to keep them private, but being withal both encouraged, and in manner thereunto enforced, to publish and communicate them to all, wherein my Comfort and Contentation is great, both in respect of your singular and favourable Approbation of my former Labours, as for that I (knowing mine own Weakness) have one great Advantage of many famous and excellent Men that have taken upon them the great and painful Labour of Writing: For they, to give their Works the more Authority and Credit, have much us'd the Figure Prosopopeia in faining divers Princes, and others of high Authority, excellent Wisdom, profound Learning, and long Experience, to speak such Sentences, Rules and Conclusions, as they intended and desired for the common Good, to have obeyed and observed, as Zenophon the great in his Book which he wrote of the Institution of Princes, faineth that King Cambyfes taught and speak many excellent Things to Cyrus his Son; and in another Book

ter obfuerunt. Illud enim absolute statuto (qd' & alias atiam attigi) majorum librorum studiosam & methodicam perlectionem, certam viam ac rationem esse ad constantem perfectamque jurisprudentiam assequendam: Interim compendiis tanquam indicibus utendum censeo, libris vero ipsis innitendum ac fidendum; neque enim prudentis arbitrator sectari rivulos, ubi fontes ipsos petere liceat. Et sane constat tumultuar' compendiorum lectio', confusum judic' & interruptam ac perturbatam elocution' causare. Leges vero pœnales in eam methodum atq; formam (adhibitis insup' cautionibus quas supraposuimus) reducere, (qd' non nisi in honorario Commitiorum conventu, neq; sine eor' quos prius attigimus consilio fieri potest) opus esset universæ reipub. utile, laudabile, gloriosum. Quarta hæc pars Relationum meorum, verum sensum atq; exposition' Legum in multis capitibus nunquam prius judicatis aut definitis continet: Quæ quia ad commune multor' bonum ac tranquillitatem (mea opinione) spectare vident', (quem novit Deus) unum mihi finem in illis edendis fuisse

To the READER.

fuisse propositus, officii mei
gera rempub. putavi eas
non suppressere, verum
efferre in lucem omnibusq;
publicare, ad id præsertim
non invitatus modo, sed
tractus quasiq; compulsus :
Qua quidem in re magna
mihi solatio est, tum sin-
gularis vestra superiorum
mearum elucubrations' ap-
probatio, tum qd' imbeci-
litate meâ conficius, illud
unum mihi præ multis il-
lustribus sane ac præstan-
tissimis viris, qui difficilem
hunc scribendi labor' sus-
ceperunt commode acci-
dit, qd' illi quo fidem atq;
authoritat' operib' suis con-
ciliarent, figura illa quam
Prosopœiam vocant sæpi-
us usi sunt, dum multis
principib' aliisq; in summa
potestate constitutis, deni-
que excellenti prudentia
recondita doctrina, longa
experientia viris, eas sen-
tentias, regulas ac conclu-
siones affinxerunt, quas
ipsi ad bonum publicum
resipi atque observari vo-
lebant & cupiebant: Ita
magnus ille *Xenophon* in
libro quem de institutione
principis scripsit, fingit
imprimis quod *Cambyfes*
ipse *Cyrum* filium mul-
tas res præstantissimas do-
cuit; & rursus de dici-
plina Militari sermonem
instituens, regem *Philip-
pum* inducit, *Alexandrum*

*which he wrote of the Art of
Chivalry, he saith how K.
Philip taught and instructed
his Son Alexander to fight.
But I, without Figure, or fain-
ing, do report and publish the
very true Resolutions, Sen-
tences and Judgments of the
Reverend Judges and Sages
of the Laws themselves, who
for their Authority, Wisdom,
Learning and Experience,
are to be honoured, reveren-
ced and believed. The due
Observation of the said
Laws doth generally without
any Limitation or Exception
concern all: But principally
Princes, Nobles, Judges and
Magistrates, to whose Custody
and Charge the due Executi-
on (the Life and the Soul of
the Laws) is committed; for
that they in respect of their
Places are more eminent and
conspicuous than other Men,
wherein three Things are ne-
cessarily required, Under-
standing, Authority, and
Will: Understanding con-
cerneth Things and Persons;
that is, first what is Right,
and just to be done, and what
ill, and to be avoided; se-
condly, what Persons for Mer-
it are to be rewarded, and
what for Offences to be pu-
nished: And both in Reward
and Punishment to observe
Quantity and Quality. Au-
thority to protect the good,
and to chastise the ill. Will
prompt*

To the READER.

prompt and ready duly, sincerely, and truly to execute the Law. But forasmuch as many Adversaries, and two open Enemies do continually lie in wait to Assault this good and ready Will, it must of Necessity have two defensive compleat Armours of Proof: First Integrity against these 6 secret Adversaries, Gifts, Affections, Intreaty, Anger, Precipitation, and Morosa cunctatio, perisb delay. Secondly, Fortitude and Constancy against the Terror of Malice and Fear of Danger, two open and violent Enemies: Videte Judices quid faciatis, non enim hominis exercetis judicium sed Domini, & quodcumq; judicaveritis in vos redundabit. And Deus est Judex justus, fortis, & patiens, and so must every Judge be. Justus, without respect to give every Man his own: And therefore Judicia are so called, because they are tanquam Juris dicta, and the Law whereby you judge est meus quædam nullo perturbata affectu, Arist. lib. 3. polit. Fortis against Malice and Danger, Neq; timida probatas, neq; improba fortitudo reipublicæ est utilis. And Patiens, when he doth Justice sincerely and with a good Conscience, and yet is despised, despised, or disgraced: Non

filium suum ad pugnam instituentem: Ego vero sine figura aut fixatione omnino aliqua, fero in publicum ipsissimas quidem solutiones, sententias ac judicia, reverendissimorum Judicium legumque Antistitum, qui propter autoritatem, prudentiam, doctrinam, atque experientiam, facile honorem, reverentium ac fidem merentur. Jam vero legum justa observatio, ut in genere omnes absque ulla limitatione aut exceptione respicit, ita præcipue Principes, Nobiles, Judices, ac Magistratus, quorum fidei & tutelæ earum debita administratio (quam vitam atque animam legum vero dixeris) committitur ac demandatur; quando illi respectu ordinis & loci quem obtinent, longe eminentiores atque conspicui præ aliis existunt. Hic ergo tria necessario requiruntur, Judicium, Authoritas, Voluntas: Judicium res aut personas respicit, id est, primo quid factu rectum justumque, quid item malum ac declinandum. 2. Quibus præmia merito debentur, quibus etiam pœnæ; ac ut in utrisque quantitas & qualitas juste observetur: Authoritas ad

2 Paralip.
19. vers. 6.

To the READER.

cem quintum addere: Regio quidem Dav. Williams equitem, fervientem, ad Legem, Communi vero Gulielmum Daniel equitem, fervientem item ad Legem: Dicente infuper Magift. fua, quod *Numero Deus impare gaudet.* 2. Impedimentum fuit, quod multæ quæftiones dubiæ adhuc maneat non definitæ; quæ quidem ortæ funt, partim ex ftatutis quibufd' recentiorib' perplexis ac male fcriptis; partim ex commentis atq; inventionibus novis in pactis firmandis & fatisfactionibus: Quales neque vidit oculus juris apud fæculum prius, neque etiam dum adduci poteft ut approbet aut amplexetur: Partim deniq; ex Paftionibus & Testamentis fcriptis factisq; ab iis qui fcientiam habent Scolorum, quæ eft mixta ignorantia. Quæ fane quæftiones atq; controverfiæ jamdiu ortæ, ut fecundum verum fenfum Legum hujus Regni folvantur, Magift. ipfi' magnopere defideravit; nec non ut discrepantes fententiæ atque opiniones judiciariz in diverfis foris ortæ, communi confilio & matura deliberatione componantur atq; determinentur. Quin & certior factus Rex, ut videtur, quod in

Commandment being to me fuprema Lex, hath both encouraged and impofed a Neceffity upon me to publifh this 4th Edition: Which containeth nothing but his Majefty's own, being fweet and fruitful Flowers of his Crown; for the Laws of England are indeed fo called, Jura Coronæ, or Jura Regia: Because as Braçton, lib. 1. cap. 8. faith: Ipfe autem Rex, non debet effe fub homine, fed fub Deo & Legia, quia Lex facit Regem: Attribuat igitur Rex legi, qd' Lex attribuit ei, videl' domination' & imperium: Non eft enim Rex ubi dominatur voluntas, & non Lex: That is, the King is under no Man, but only God and the Law, for the Law makes the King: Therefore let the King attribute that to the Law, which from the Law he hath received, to Wit, Power and Dominion: For where Will, and not Law doth fway, there is no King. And in the Register the Words of the Writ of Ad Jura Regia, be, Rex, &c. falutem: Ad jura noft' Regia ne depereant, feu per aliquor' ufurpationes indebit' aliquid fubtrahantur, quatenus juftè poterimus, manutenenda, fubtractaq; & occupata, fi quæ fuerint ad ftatum debitum

To the READER.

bonos tuendos, malos puniendos: Denique voluntas prompta atque expedita ad synceram ac debitam legum executionem: Quoniam vero multi adversarii & præsertim duos hostes aperti, juste huic ac promptæ voluntati semper insidiantur, duplici armatura gravi & defensiva opus est. 1. Integritate adversus sex latentes hostes, viz. Dona, Affectiones, Rogationes, Iras, Præcipationem, & morosum cunctationem. 2. Fortitudine & Constantia contra terrorem malitiæ, & timorem periculi, qui duos hostes sunt aperti acerrimique. *Videte Judices quid faciatis, non enim hominis exercetis judicium sed Domini, & quodcumque judicaveritis, in vos redundabit. Deus est Judex justus, fortis, & patiens, talem decet esse omnem Judicem. Justum, sine respectu quod suum est cuique dando, ideoque Judicia sic dicuntur quasi Juris dicta; & Lex secundum quam judicium fit, est mens quædam nullo perturbata affectu, Arist. polit. 3. Fortem, contra malitiam & periculum; nam neque timida probitas, neque improba fortitudo reipub. est utilis. Denique Patientem, ut sincere & ex*

solam (pœna, sed patientia acquireret nomen perfectionis, & gloriam victoriæ. *Aristotle, lib. 2. Top: Melius est judicare secundum leges & literas, quam ex propria scientia & sententia. Ignorantia Judicis est plerumque calamitas innocentis, and hereof it proceedeth that the Kings of this Realm have had such special Care of calling such Men to judicial Places, as have Knowledge, and other the Incidents inseparable above-mention'd. And because these Judges are (if Order be observed) taken of such as be Serjeants, especially Care is always taken in calling Men of Learning, Integrity, and Living to that State and Degree; never can a Judge punish Extortion, that is corrupted himself, nor any Magistrate punish any Sin as he ought, that is known to be an Offender therein himself; therefore it is an incident inseparable to good Government, that the Magistrates to whom the Execution of Law is committed be principal Observers of the same themselves. But herein hear what shall be said, to the which nothing can be added; Et nunc regis intelligite, erudimini qui judicatis terram, Servite Domino in timore, & exultate ei cum*

To the READER.

cum tremore, apprehendite disciplinam, ne quando irascatur Dominus, & pereatis de via justa. *Whosoever will be compleat Judges, Intelligite, apprehendite, erudimini, servite, exultate, you must be appalled with the rich Robes of Understanding and Learning, you must your selves imbrace Discipline, you must observe the Lawes your selves, with great Fear an Humility, which if you will do, Servite Domino in timore; you must be Chearful, and Comfort your selves in doing of Justice, for you shall find many Crosses and Dangers. Et exultate, but yet cum tremore, do all these Things least ye enter into Wrath, and so ye perish from the way of Righteousness; whereby it appeareth, that the greatest loss a Judge or Magistrate can have, is to give himself over to Passion, and his own corrupt Will, and to lose the way of Righteousness, Et pereatis de via justa. To the whole Body of the Realm concerning this Point I say, your Fault will be the greater, if having a Sovereign so religious, Wise and Learned, so great an observer of Lawes, so virtuous of his own Person, you apply not your selves to his Example and President; for the Heathen*

pura conscientia justitiam administraret, licet inde despicatur, opprobrio, forte etiam ludibrio habitus sit; nam non solum poena, sed patientia acquirit nomen persecutionis, & gloriam victoriae. *Arist. 2. Top: Telius inquit est judicare secundum Leges & literas, quam ex propria scientia & sententia. Ignorantia Judicis est plerumque calamitas innocentis.* Atque hinc est quod Regibus nostris illud imprimis curae semper fuit, ut ad jus publice dicendum eos promoverent qui scientia aliiisque supradictis virtutibus præpollerent. Et quoniam Judices hii ordinarie quidem ex servientibus ad Legem eliguntur, cautum præcipue est, ut ad statum & gradum ill' non nisi viri doctrina, integritate, opibus pares vocentur. Neq; enim potest Index de pecuniis repetundis alium damnare, qui est ipse compilator: neque cuius Magistratus crimen aliquod uti par est punire, cujus ipse reus esse dignoscitur. Illud ergo in omni bene instituta repub. necessario requiritur, ut Magistratus quibus legum administratio committitur, easdem ipsi præ aliis observent, ad quam
rem

To the READER.

rem sententiam illam (cui nihil addi potest) apponam: *Et nunc Reges intelligite, erudimini qui iudicatis terram: Servite Domino in timore, & exultate ei cum tremore, apprehendite disciplinam, ne quando irascatur dominus, & pereatis de via iusta. Qui iudices completi esse vultis intelligite, apprehendite, erudimini, servite, exultate, preciosis imprimis vestibus intelligentiæ & doctrinæ indui ipsos vos oportet, disciplinam apprehendere, leges observe, idque magno cum tremore ac humilitate; quod ut facere possitis, servite Domino in timore: Alacres sitis oportet, & conscientia iustitiæ administratæ solari vos, siquidem multas invenietis tribulationes, multa pericula; & exultate, verum cum tremore: Hæc omnia facite, ne quando irascatur Dominus, & pereatis de via iusta. Unde patet quod gravissima jactura quam Judex aut Magistratus potest facere, in eo est ut passioni sese ac corruptæ suæ voluntati tradat, atque ita pereat de via iusta. Illud denique toti reipub. nostræ corpori dico atque edico, quod graviore omnes culpa rei*

PART IV.

Poet could say; Regis ad exemplum totus componitur Orbis. But whilst I was intending and going about this Edition, I by Commandment attended upon his most excellent Majesty for Direction about his Highness Affairs that concerned the Duty of my Place to prosecute; at what Time I well perceived what princely Care his Majesty had taken for Execution and Expedition of Justice, and that upon Consideration thereof he found two Impediments therein: One, that in the two eminent Courts of ordinary Justice, the King's Bench, and the Common Pleas, there were four Judges; and many Times in Cases of great Difficulty, the Judges being equally divided in Opinion in either Court, the Matter depended long undecided: For preventing whereof his Majesty in this Term of Saint Hillary, in the first Year of his most happy and prosperous Reign, added a Judge more to either Bench, Sir David Williams Kt. Serjeant at Law, to the King's Bench; and Sir Wm. Daniel Kt. Serjeant at Law, to the Court of Common Pleas, his Majesty's saying, that Numero Deus impare gaudet. The second Impediment was, that divers Doubts and

b

Quæsti-

To the READER.

Questions of Law remained undetermined, the same rising partly upon long and ill-penned Statutes lately made, partly by reason of late, and new Devises and Inventions in Assurances, which the Eye of the Law in former Ages never beheld, and cannot yet incline to allow them, and partly by Conveyances and Wills drawn and devised by such as have Scientiam scilorum quæ est mixta Ignorantia: Which Questions and Doubts already grown, his Majesty desired might be resolved and determined according to the true Sence of the Lawes of the Realm. And where there have been some Diversity of Opinions between certain of the Courts of Justice, that the same might upon Conference and mature Consideration be agreed and resolved. And his Majesty Understanding (as it seemeth) by reason of my former Editions, that I have observed many Determinations and Judgments of questionable and doubtful Cases, which upon great Study, Consideration, Conference and Deliberation, have been resolved and given by the Reverend Judges and Fathers of the Law, required me to proceed, and for the general Good and Quiet of the Subject to publish them, whose

tenebimur, siquidem Regem habentes adeo pium, prudentem, doctum, diligentem legum virtutumq; omnium cultorem, illius nos exemplo non accomodemus, quando poeta ethnicus dicere potuit; *Regis ad exemplum totus componitur Orbis.* Interea verodum huic Editioni operem dabam, Regiam Majestatem ex mandato adii decelsitudinis ipsius negotiis quibusdam ordinandis, quorum administratio munus meum spectabat; quo quidem tempore illud imprimis perspexi, quam impense Magist. ipsius execution' atq; expeditionem justitiæ curaverat, quodq; re mature pensitata, duo ejus impedimenta invenisset: Unum quod in duabus eminentissimis justitiæ ordinariæ Curiiis (Banco, viz. tam regio, quam Communi ut loquimur) quatuor tantum iudices essent, unde sæpius usu venit, ut in causis perplexis & difficilioribus, æqualiter divisis ac discrepantib' Judic' utraq; Curia sentent', lis non decisa diutius penderet: Cui malo ut occurreret, placuit Magist. ejus in hoc Term' *S. Hill'*, an' i, foelicissimi ipsi ac florentissimi Regni, utriusque Banco (ut loquimur) Judicem

To the READER.

revoeanda, necnon ad impugnatores eorundem juri-um nonstror' refranandos, & prout convenit juxta eor' demerita puniendos, eo studiosius nos decet operam adhibere, & solici- tius extendere manum no- stram, quo ad hoc vinculo Juramenti teneri dignosci- mur & astringi, pluresque conspeximus indies jura il- la pro viribus impugnare, &c. 1. *That our kingly Laws and Rights perish not, nei- ther be at all withdrawn by undue Usurpation of any, which so far forth as justly we may, are to be maintain- ed, and if any shall be with- drawn or diverted, to be a- gain restored to their due State; as also for the brid- ling of the Impugnors of those our said Laws, and the pu- nishing of them as is meet ac- cording to their Deserts, we ought the more diligently to provide, and the more care- fully to extend our Hand and Authority; for that we are known to be thereto tied and bound by the Bond of an Oath, and for that we daily see very many to their Powers to impugne those said Laws. And again, Rex, &c. salutem. Ad conservacione Jurium Coronæ nostræ, eo nos decet studiosius ope- ram adhibere, quoad hoc astringimur vinculo Sacra-*

superioribus meis elucu- brationibus multas cau- sarum dubiarum atq; per- plexarum decisiones ac conclusion' retulerim, quæ magno sane studio, consi- lio, deliberatione per re- verendos Judices at patres Juris datæ fuerint, progre- dime jussit, easq; ad pub- licum bonum atque tran- quillitatem Subditor' di- vulgare: Cujus sane man- datum (quod supremæ Le- gis loco habeo) ut Quar- tum hunc librum ederem & me movit, & necessita- tem quandam attulit. In quo quicquid continetur ipsius totum ac proprium est, viz. suavissimi lectissi- mique coronæ flores: Nam & revera sunt & appellan- tur Leges Angliæ. Jura Coronæ aut Jura Regia, quia ut inquit, *Bracton lib. 1. cap. 8. Ipse autem Rex no- strum debet esse sub homine, sed sub Deo & Lege, quia Lex facit Regem: Attribuit igitur Rex legi, quod Lex at- tribuit ei, viz. dominatio- nem & imperium. Non est enim rex ubi dominatur voluntas & non Lex. Et in Registro verba rescripti (cui titulus ad jura regia) sunt: Rex, &c. salutem: Ad iura nostra Regia, ne depercant, seu per aliquorum usurpationes indebitas ali- qualiter subtrahantur, qua- tenus*

To the READER.

tenus iuste poterimus manutenenda, subtractaque & occupata si que fuerint ad statum debitum revocanda, nec non ad impugnatores eorundem jurium nostrorum refrœnandos, & prout convenit juxta eorum demerita puniendos, eo studiosius nos decet operam adhibere, & sollicitius extendere manum nostram, quo ad hoc vinculo juramenti teneri dignoscimur & astringi, pluresque conspicim' indices jura illa pro viribus impugnare, &c. Et rursus, Rex, &c. salutem: Ad conservationem jurium Coronæ nostræ, eo nos decet studiosius operam adhibere, quo ad hoc astringimur vinculo sacramenti, & alios conspicimus ad ipsorum jurium enervationem amplius anhelare, &c. denique concludit, Et sciatis quod si secus facere presumpseritis, ad vos tanquam violatores regii juris nostri non immerito graviter capiemus. Ex quibus antiquis rescriptis constat: 1. Quam capitale flagitium semper habitum est, leges hæc quæ Imperiales sunt & Coronæ jus respiciunt, impugnare aut calumniari. 2. Quod in omnibus fere sæculis Leges istæ multos habuerunt qui eis obstitissent intercederentq; violatores. Denique quam graviter puniendi sunt,

& alios conspicimus ad ipsorum jurium enervationem amplius anhelare, &c. concluding thus, Et sciatis quod si secus facere presumpseritis, ad vos tanquam violatores Regii Juris nostri non immerito graviter capiemus, which is, we ought the more earnestly to provide for the Conservation of the the Laws and Rights of our Crown, as being thereunto tied by the Bond of an Oath; and for that we see others the more greedily to gape after the weakening and subverting of those said Laws, &c. concluding thus; and know ye that if ye shall presume otherwise to do, we shall with Grief not undeservedly hold you as Violators of our kingly Rights and Laws. By which ancient Writts appeareth: 1. What an exorbitant Offence it hath been ever deemed to impugn or calumniate these Laws, being the imperial Laws of the Crown. 2. That in all Ages, these Laws have had many that sought to impugn and violate them: And lastly how grievously such as so presumed to offend, should be punished; Nam & frustra feruntur Leges nisi severe puniant' contemptores; and it is truly said, that Non debet Princeps ferre Legum

To the READER.

Legum suarum ludibrium: *And woeful Experience hath often taught, (which I my self have sometimes observ'd) that many of those Men that have strained their Wits, and stretch'd their Tongues to scandalize or calumniate these Laws, had either praesided or plotted some heinous Crime, and therefore hated, because they feared the just Sentence and heavy Stroke. The reading of the several Reports and Records of these Laws, doth not only yield immense Profit, as elsewhere I have noted; but doth contain the faithful and true Histories of all successive Times, as well concerning the Punishment of the Evil for their heinous, horrible, and exorbitant Offences, as concerning the Reward and Advancement of Men of great Merit and Virtue for their high and honourable Service in the Commonwealth: And (which is above all) they are Memorials to all Posterity of the valorous Piety, Virtues and Victories of the Kings and Princes of this Realm. The first appeareth most evidently amongst other Things by the Creations and Erections of Men of great desert to eminent Places, and Degrees of Nobility and Honour, of such Estates, and in such Manner*

qui peccare in hoc genere praesumpserint: Nam & frustra fuerunt Leges nisi severe puniantur contemptus, & verissime dicitur; *Quod non debet Princeps ferre Legum suarum ludibrium*. Quin & sepius docuit misera ac luctuosa experientia (quod aliquando ipse etiam observavi) multos qui in id ingenii nervos omnes intenderunt, linguasque exacerant, ut Legibus huiusmodi scandalum aut calumniam imponerent, nefarium aliquid crimen aut commississe, aut fuisse machinatos; ideoque leges odisse, quia justam censuram & gravem plagam metuerent. Lectio istarum Legum ut referuntur ac mandantur literis, non solum utilitatem summam affert (sicut alias attigi) verum fidelem etiam certamque historiam omnium superiorum temporum complectitur, tam respectu praemii atque promotionis bonorum optimeque meritorum virorum, propter egregium atque honorabilem operam reipublicae datam; quam poenae malorum propter nefaria atrocissima ac immania flagitia: Denique (quod caput est) libri isti memoriales sunt ac monumenta ad omnem posteritatem pietatis, virtutum, fortitudinis, atque victoriarum Regum ac Principum huius Imperii: Atque
pri

To the READER.

primum quidem clarissime patet cum alas, tam præcipue ex eo, qd' viri optime meriti ad excelsa atque illustria loca, nec non ad nobilitatis & honoris gradus evecti sunt, tantum ordine modo ac forma a Legib' hujus regni præscript' & constitutis: 2. Etiam constat ex formulis convincendi atque prosequendi capitalium aliorumque criminum reos: Tercium, ex multis præclarissimis scriptis ac monumentis fidelissimis illis sane & perpetuis testibus dignisque adeo que divulgentur omnibusque innotescant: Ad quam rem, (ne extra terminos ac fines, suos egrediatur præfatio) unum in hoc tempore exemplum ejus generis charitæ sive donationis accipite, factum quidem ab *Edgardo Rege Angliæ*, inde vero scripto traditum, ac vel in hunc usq; diem fidelissime asservatum.

“ *Altitonandis Dei largi-*
 “ *flua clementia, qui est*
 “ *Rex regnum, & Domi-*
 “ *nus Dominantium, ego Ed-*
 “ *garus Anglor' Basileus,*
 “ *omniumq; rerum Insular'*
 “ *Oceani que Britanniam*
 “ *circumjacent, cunctarum-*
 “ *que Notionum que infra*
 “ *eam includuntur Impera-*

and Form, as are warrant-
ed by the Lawes of the Realm:
The second by the Records
of the Attainders in judicial
Proceedings against Capital
and other Offenders. And
the third by many excellent
Records, the most faithful
and perpetual Witnesses,
and worthy to be published,
and made known to all;
and therefore at this Time,
least my Preface should ex-
ceed his proper Model of
that Sort; take one Exam-
ple of a Charter made by
Edgar King of England,
and recorded, and thereby
faithfully continued to this
Day.

“ *Altitonandis Dei lar-*
 “ *giflua clementia, qui*
 “ *est Rex Reg', a Domi-*
 “ *nus Dominantium: E-*
 “ *go Edgarus Anglor' Ba-*
 “ *fileus, omniumq; rerum,*
 “ *Insularum Oceani quæ*
 “ *Britan' circumjacent,*
 “ *cunctarumq; Nationum*
 “ *quæ infra eam includun-*
 tur

To the READER.

tur Imperator & Domi-
 nus: Gratias ago ipsi
 Deo omnipotenti Regi
 meo, qui meum imperium
 sic ampliavit & exaltavit
 super Regnum patrum meorum.
 Qui licet Monarchiam totius
 Angliæ adepti sunt a tem-
 pore Athelstani, qui pri-
 mus Reg' Angl' omnes
 Nationes quæ Britanniam
 incolunt sibi armis sub-
 egit, nullus tamen eor'
 ultra fines Imperium
 suam dilatare aggressus
 est, mihi tamen concessit
 propitia divinitas cum
 Anglor' imperio, omnia
 regna Insularum Oceani
 cum suis ferocissimis
 Regibus usq; Norve-
 giam, maximamque partem
 Hiberniæ, cum sua nobil-
 issima Civitate de Dublina,
 Anglorum regno subjugare;
 quos etiam omnes meis im-
 perii, colla subdare Dei
 favente gratia coegit.
 Quapropter & ego Christi
 gloriam & laudem in regno
 meo exaltare, & ejus ser-
 vitium amplificare devotus
 disposui: Et per meos fideles
 fautores Dunstan', videl't,
 Archiepisc', Ayelyolan', ac
 Oswaldum Archiepiscopus,
 quos mihi patres spirituales
 & confiliatores elegi, magna ex

tor & Domini: Gratias ago
 ipsi Deo omnipotenti Regi
 meo, qui meum imperium
 sic ampliavit & exaltavit
 super Regnum patrum meorum.
 Qui licet Monarchiam totius
 Angliæ adepti sunt, a tem-
 pore Athelstani qui primus
 Regum Anglorum omnes
 Nationes quæ Britanniam
 incolunt sibi armis subegit,
 nullus tamen eorum ultra
 fines Imperium suum dilatare
 aggressus est; mihi tamen
 concessit propitia divinitas
 cum Anglorum imperio,
 omnia regna Insularum
 Oceani cum suis ferocissimis
 Regibus usque Norve-
 giam, maximamque partem
 Hiberniæ, cum sua nobil-
 issima civitate de Dublina,
 Anglorum regni subjugare:
 Quos etiam omnes meis
 imperiis colla subdare Dei
 favente gratia coegi.
 Quapropter & ego Christi
 gloriam & laudem in Regno
 meo exaltare, & ejus ser-
 vitium amplificare devotus
 disposui: Et per meos fideles
 fautores Dunstanium:
 viz. Archiepiscopum, Ayelyolanum
 ac Oswaldum Episcopum,
 quos mihi patres spirituales
 & Confiliatores elegi, magna ex
 parte disposui, &c. Facta
 sunt hæc anno Domini
 964. Indictione 8 Regni
 vero

To the READER.

“ vero Edgari Anglorum
 “ Regis 6. in regia urbe
 “ quæ ab incolis Ocleyeca-
 “ stræ nominatur, in Na-
 “ tale Domini festiuitate,
 “ Sanctorum Innocentium e-
 “ ria 4, &c. ✠ Ego Ed-
 “ gar Basilius Anglorum
 “ & Imperator Reg’ gen-
 “ tium cum consensu &
 “ Principium & Archimeo-
 “ rum hanc meam munifi-
 “ centiam signo crucis corro-
 “ borō ✠ Ego Alfrie Re-
 “ gina consensi & signo
 “ crucis confirmavi. ✠ Ego
 “ Dunstan’ Archiepiscopus
 “ Dorobor. Ecclesiæ Christi
 “ consensi & subscripsi. ✠ E-
 “ go Ofsticel Archiep’ Eborac-
 “ ensis Eccl’ consensi & sub-
 “ scripsi. ✠ Ego Alferic
 “ Dux. Ego Bruthnod
 “ Dux. Ego Aridgari Dux.
 ✠ Ubi hæc obseruanda:
 1. Ejus in Deum pietas ac
 devotio, quæ beatitudinis
 omnis fons est & summum
 bonum. 2. Imperii ejus
 amplitudo & Hibern’ pri-
 ma subjugatio, diu ante te-
 pora Regis Hen. 2.

“ parte disposui, &c. Fa-
 “ cta sunt hæc anno Dom’
 “ 964. Indictione 8. Reg-
 “ ni vero Edgari Anglor’
 “ Reg’ 6. in regia urbe quæ
 “ ab incolis Ocloyecca-
 “ stræ nominatur, in na-
 “ tale Dom’ festiuiate,
 “ sanctorum Innocentium
 “ feria 4, &c. ✠ Ego Ed-
 “ gar Basilius Anglor’ &
 “ Imperator Reguum gen-
 “ tium, cum consensu &
 “ Principium & Archimeo-
 “ rum meor’ hanc meam
 “ munificentiam sig’ cru-
 “ cis corroboro. ✠ Ego
 “ Alfrie Regina consensi
 “ & signi crucis confir-
 “ mavi. ✠ Ego Dunstan.
 “ Archiepiscop’ Dorobor.
 “ Ecclesiæ Christi consensi
 “ & subscripsi. ✠ Ego O-
 “ sticel Archiopisc. Ebo-
 “ racensis Eccl’ consensi
 “ & subscripsi. ✠ Ego
 “ Alferic Dux. Ego Bruth-
 “ nod Dux. Ego Aridgari
 “ Dux. ✠ *Whereby is to be
 observed, first his Piety and
 Devotion towards God the
 Fountain of all Happiness;
 the true Summum bonum.
 Secondly, the Largeness of
 his Empery, and the first
 Conquest of Ireland, long
 before the Reign of K. Hen.
 the Second.*

Ut ergo concludam, il-
 lud a docto lectore peto,
 vel ut corrigat sicubi errat-
 tum invenerit, vel fal-

PART IV.

To conclude, of the learn-
 ed Reader my desire is, that
 he would either amend that
 which herein he shall find

6

Amis;

To the READER.

amiss, or at least that he will not find Fault with any Part, until he hath seriously read over the Whole, and then it may be, he will reprehend the Less: And although herein I have taken all the Labour; yet I unsainedly wish to all the Readers, all, or at the least, equal Profit.

Plura quidem feci, quam
quæ comprehendere dictis
In promptu mihi sit; Re-
rum tamen ordine ducar.

Interea Lector valeas, &
memineris quod quicun-
que genuinum sensum
ac vim alicujus legis
commento aut techna
illuserit, legis violator
habendus est.

tem ne partem aliquam
reprehenda, donec totum
studiose perlegerit, unde
forte fiet ut pauciora cri-
minetur: Et utcumq; la-
bor iste totus sit meus:
Lectoribus tamen singu-
lis, idque ex animo omne,
aut saltem parem mecum
fructum exopto.

*Plura quidem feci, quam
quæ comprehendere dictis
In promptu mihi sit; Re-
rum tamen ordine ducar.*

Interea Lector valeas, &
memineris quod quicun-
que genuinum sensum ac
vim alicujus legis com-
mento aut techna illuse-
rit, legis violator haben-
dus est.

Bene Vale.

*Michaelis Decimo Quarto &
Decimo Quinto Regina ELI-
ZABETHÆ.*

VERNON'S Case.

IN a Writ of *Dower* brought by *Mary Vernon* against *John Vernon*, Esq; of the Manor of *Sudbury* in the County of *Derby*: The Tenant pleaded, that her Husband was also seized of certain Lands in the same County in his Demesnas of Fee, and by Deed indented thereof enfeof'd Sir *Thomas Gifford*, Knight, and others, and their Heirs to the Use of himself for the Term of his Life, without Impeachment of Wast, and after his Decease, to the Use of the Demandant then his Wife, for the Term of her Life; and after her Decease to the Use of the right Heirs of the Husband; and averr'd, that the said Estate for Life limited to the said Demandant, was for her Joynture, and in full Satisfaction of her Dower, and that after the Death of her Husband, the Demandant enter'd into the said Land so limited to her for her Joynture, and agreed to it: To which the Demandant replied, and confessed the said Feoffment, and the Limitation of the Uses, *s.* to the Use of the Husband for his Life without Impeachment of Wast, and afterwards to the Use of the Demandant, for her Life; but further said, that the Limitation to the Wife for Life, was upon Condition that she should perform the Last Will of her Husband; and shew'd all the Will in certain, in which divers Things were to be perform'd by the Demandant, and demanded Judgment if the Tenant should be admitted, and receiv'd to aver that this Estate so limited to the Wife upon the said Condition, was for the Joynture of the Wife, and in Satisfaction of her Dower; upon which Matter the Tenant demurr'd in Law: (a) Co. Lit. 36. B. 9 Co. 79. b. 1 Rol. Rep. 297.
And in this Case five Points were resolv'd.

1. That by the Rule of the Common Law, a Right or Title which any one has to any Lands or Tenem. of any Estate of Inherit. or Freeho. can't be barred by Acceptan. of any Mann. of The 1 Point Doct. pla. 17. 2 Brownl. 132. Dyer 91. pl. 124.

B

(a) collateral

- (a) Doct. pl. 17. (a) collateral Satisfaction or Recompence: as if *A.* disfeises *B.* Tenant for Life, or in Fee, of the Manor of *Dale*, and afterwards gives the Manor of *Sale* to *B.* and his Heirs, in full Satisfaction of all his Rights and Actions which he has in or for the Manor of *Dale*, which *B.* accepts, yet *B.* may enter into the Manor of *Dale*, or recover it in any real Action; For a Right or Title of (b) Freehold or Inheritance can't be barr'd by any collateral Satisfaction, but by Release or Confirmation, or an Act which tantamounts, and therefore it is commonly said in our Books, that (c) Accord with Satisfaction is a good Plea in Personal Actions, where Damages are only to be recover'd, and not in real Actions: Vide 13 H. 7. 13, 20, &c. And that was the Reason that no collateral Satisfaction or Recompence made to the Wife in Satisfaction of her Dower, was any Bar of her Dower by the Common Law: But Dower *ad ostium Ecclesie*, or *ex assensu patris* concluded her of her Dower, (d) if she enter'd into the Land so assigned, after the Death of her Husband; for the Law allows them, being made in such Form as the Law requires, to be Dowers in Law. But if a Man in Consideration of a Marriage after to be had with *A.* makes an Estate of certain Lands to her for her Life, in full Satisfaction of all the Dower which after Marriage may accrue to her in any of his Lands, and after they intermarry, that was no (e) Bar of her Dower at the Common Law for two Reasons; one, because she had no Title of Dower at the Time of the Acceptance of the Satisfaction, but it accru'd after: Secondly, because no (f) collateral Satisfaction can Bar any Right or Title of any Inheritance or Freehold, as has been said, and thereby the Doubt in 29 E. 3. 3. is well resolv'd. So if the Husband purchases or causes an Estate to be made to him and his Wife for Life, or in Tail in full Satisfaction of her Dower, and dies, that was no Bar of her Dower at the Common Law, *causa qua supra*: So if after the Death of the Husband the Heir makes an Estate to the Wife for Life of any Land (g) (whereof she is not dowable) in full Satisfaction of her Dower, that is no Bar of her Dower: Vide the Case now in the Reports of the Lord Dyer, (h) 1 Mar. 91. acc. & vide (i) 31 E. 3. *Scire facias* 99. Before the making of the Statute of 27 H. 8. cap. 10. the greatest Part of the Land in England was convey'd to sundry Persons to Uses, and so far as a Wife was not dowable of (k) Uses, her Father or Friends upon her Marriage procur'd the Husband to take an Estate from his Feoffees, or others seised to his Use, to him and to his Wife before or after Marriage for their Lives, or in Tail, for a competent Provision for the Wife after the Husband's Death: Then comes the Statute of 27 H. 8. which transfers the Possession and Estate of the Lands

(b) Co. Lit. 36. b.
9 Co. 79. b.
1 Rol. Rep. 297.
2 Brown. 132.
Dy. 91. pl. 12.
(c) 6 Co. 43. b. 44. a.
13 H. 7. 13, 20.
Cro. El. 357.
Cro. Jac. 100.

(d) Co. Lit. 36. a. b.
Lit. Sect. 43.

(e) Co. Lit. 36. b.

(f) Co. Lit. 36. b.
supra.

(g) Co. Lit. 34. b.

(h) 1 Mar. Dyer.
91. pl. 12, 13.
31 E. 3. Sci fac.
(i) Co. Lit. 36. b.
Perk. Sect. 410.
Dyer 91. pl. 13.
(k) Dyer 266. pl. 7.

to the Use, by which the Husbands were seized accordingly, and by Consequence if further Provision had not been made, the Wives would have as well their Dowers as their Joyntures for the Reasons aforesaid, and for this Reason the Branches concerning Joyntures were added to the said Statute of 27 H. 8. And therefore it was resolv'd, that if this Estate in the Case at Bar limited to the Wife, was not within the said Act of 27 H. 8. that by the Common Law it was no Bar of the Demandant's Dower, but that she should have both.

Secondly, it was resolv'd, That if a Man makes a Feoffment to the Use of himself for Life, (a) and afterwards to the Use of his Wife for her Life, for the Joynture of his Wife, that such Estate in Remainder is within the Intent of the said Act of 27 H. 8. For altho' the Statute expresses particularly these five Forms, 1. To the Husband and Wife, and to the Heirs of the Husband; 2. To the Husband and Wife, and to the Heirs of their two Bodies; 3. To the Husband and Wife, and to the Heirs of the Body of one of them; 4. To the Husband and his Wife for their Lives; 5. To the Husband and Wife for the Life of the Wife; and yet many other Estates not there expressed are within this Act, for the said particular Forms are put but for (b) Examples, and not to exclude any other Estate, which is to such Effect, and agrees with the Intent of the Makers of the Act; and altho' it was objected, that all the Examples express'd in the Act are of a joynt Estate made to the Husband and Wife, and none of them to the Wife only, nor by way of Remainder; and altho' by a Proviso in the same Act, it is provided, *That if any Wife shall have any Manors, Lands, &c. unto her assur'd after Marriage, for Term of her Life, or otherwise, in Joynture, &c.* so as the Letter of the Act imports a joynt Estate, and that this Word *Joynture* implies a joynt Estate, and that the Dowers of Women are much favour'd in Law; yet it was resolv'd, that all is of one Effect as to the Wife, to limit an Estate to the Husband and Wife for their Lives, (c) and to the Husband for his Life, the Remainder to the Wife for her Life; for the one Estate is as beneficial to the Wife as the other; *vide* after the Case of (d) *Ashton* as to this Point. But it was resolv'd, that the Estate which by Force of this Act shall be in lieu and Bar of her Dower, ought by the Limitation thereof to take Effect (e) immediately after the Husband's Death, for that plainly appears by all the Examples expressed in the said Act, f. that the Estates of the Wives shall take Effect immediately after the Death of their Husbands; and therefore (f) no other Est. not expres. in the Act, shall be taken by the Equity of the Act, unless it has the same Beginn. for the Benef. of the Wives,

The 2 Point
(a) Dyer 340. pl. 50

(b) Lit. Sect. 21.
Co. Lit. 24. a.
Cro. Car. 533.
Inst. 311. 334.
Godb. 78. 79.
Yelv. 176.

(c) Dyer 340.
pl. 50.

(d) Postea 2. b.

(e) Co. Lit. 36. b.

(f) Hob. 40.

as the Examples purport: And therefore if the Husband makes a Feoffment in Fee to the Use of himself for Life, (a) and afterwards to the Use of B. for his Life, and afterwards to the Use of his Wife for Life, for her Joynture, it is not within the Act, altho' B. dies, living the Husband so if the Husband makes a Feoffm. in Fee to the Use of A. for his Life (b) and afterw. to the Use of his Wife for her Life, for her Joyntu. it is not within the Act, altho' A. dies living the Husb. For in these, and other like Cases, forasmuch as at the Time of the Limitation of the Estates they were out of the Act, because it was not certain that the Estate of the Wife would take Effect immediately by the Death of the Husband, as it ought by the Act, no subsequent Event can make them within the Act. For (c) *quod ab initio non valet, in tractu temporis non convalescet*; & (d) *qua malo sunt inchoata principio, vix est ut bono peragantur exitu*: And therefore in all the said and the like Cases, altho' the Wife attains to them, and enters and takes the Profits, yet she shall have Dower of the Residue. For if the said Act doth not bar her, (e) the Common Law, as has been said before, will not conclude her in such Case of her Dower. And the *Ld. Dyer* said, that it was adjudged in *Q. Mary's* Time, that where the *D. of Somerset* purchased Lands to him and to the *Duchess* his Wife, and to the Heirs Males of their two Bodies, that altho' it was not any of the Estates put for Example in the said Act, yet it was adjudg'd, that it was within the Intent of it, which Case you may see in the *L. Dyer's* Rep. 1 *Ma. 96.* (f) Also the *L. Dyer* said that it was resolv'd. in the Time of *Q. Eliz.* that where one *Ashton* in Performance of Covenants of a Marriage to be had between his Son and one *A.* made a Feoffm. to the Use of *A.* for her Life, for her Joynt. and afterw. they intermarried, and the Husband died, it was a Joynture within the Intent of the Act, and yet all the five Examples are of Estates made to the Husb. and Wife: But in the said Case of *Ashton*, the Estate was made before (g) Marriage, so that there was not any Husb. or Wife at the Time of the making of the Estate; also the Estate was only to the Woman, where all the Examples are of a joint Estate, but all is of one Effect, which Case you may see *M. 6 & 7 Eliz. Dyer 228.*

Thirdly, it was resolv'd, that altho' the Estate limited to the Wife was upon Condition, and altho' Dower (in lieu of which the Joynture comes) at the Common Law was an absolute Estate for Life, yet forasmuch as an Estate for Life upon Condition, is an Estate for Life, it was within the Words and the Intent of the Act, if the Wife after the Death of her Husband accepts it; for it was agreed that a Joynture is a (i) competent Livelihood of Freehold for the Wife, to take Effect immediately after the Death of the Husband, for the Life of the Wife, if she herself is not the Cause of the Determination or Forfeiture of it; and therefore if the Husband

(a) Winch. 33.
Hurr. 51. Hurr.
Argument 49.
Cro. Jac. 489.
Cawly 213, 214.
Co. Lit. 36. b.
Moor 903.
1 Sid. 34. 4.
(b) Hob. 151.
Winch 33.
Hurr. 51.

(c) Hurr. 51.
Cawly 214.
2 Co. 55. b.
4 Co. 90. a.
8 Co. 135. b.
20 Co. 62. a.
Cro. El. 585.
Co. Lit. 35. a.
Dav. 32. a.
2 Bullst. 304, 305.
3 Bullst. 192.
(d) 2 Bullst. 43, 192.
10 Co. 62. a.
11 Co. 78. a.
(e) Co. Lit. 36. b.

(f) *Dyer* 96. pl. 42.
97. pl. 48, 49.
The *Duchess* of
Somerset's Case.
1 *Mariae Dyer* 96.

(g) *Antea* 1. a.
Moor 28, 29.
Ashton's Case,
Mich. 6 & 7 Eliz.
Dy. 228. pl. 46, 47.

The 3 Point
(h) 1 *Leon.* 311.
Dyer 317. pl. 7.
Cr. El. 451, 452.
Postea 3. a.
Moor 31.

(i) *Co. Lit.* 36. b.
Postea 3. a.

makes a Feoffm. in Fee to the Use of his Wife, (a) for another's Life, for her Joynture, it is not within the Act, for the Estate is not for the Wife's Life, and it may determine without her Act or Default, during her Life, and thereby she will be desit. of a Livelihood: But if a Man makes a Feoffm. in Fee to the Use of himf. for his Life, and after to the Use of his Wife (b) *durante viduitate sua* for her Joynt. that is an Estate to her for her Life, and it can't determ. without her own Act, and therof. it is a Joynt. within the said Act. The same Law of an Estate made to the Wife for her Life upon (c) Condition, for if she does not break the Condition, it is an Estate to her for her Life. And in the Case at the Bar, if the Condition binds her to any unreasonable Thing, she might have wav'd it, but when she after the Death of her Husband, enters and accepts the conditional Estate for her Joynture, she is barr'd of her Dower.

(a) Hob. 40. 158.

(b) Dyer 317. pl. 7. Moor 31. Politea 70. a.

(c) Antea 2. b. 1 Leon. 321. Dyer 317. pl. 7. Cr. El. 451. 452. Moor 31.

Fourthly, it was resol. that if a Joynt. is made to a Woman (d) before Marriage, after the Husband's Death, the Wife can't wave it, and take her Dow. as she may of a Joynt. made to her during the Marriage, and that by Force of the said Proviso, the Effect of which is, that if any Woman hath any Manors, Lands, Tenem. or Heredit. assur'd to her (e) aft. Mar. for Term of her Life, or otherw. in Joynt. &c. that she after the Death of her Husb. shall have Lib. to refuse it; by which they resol. that if the Joynt. was made before Marriage that the Intent of the Makers of the Act was, that she should not refuse, but should take such Joynture as was made to her. *Vide the Case of Ashton put before as to this Purpose.* And it was said, if Lands are convey'd to a Wo. bef. (f) Marriage for Part of her Joynt. and after Marria. more Land is convey. to her for her full Joynt. and in Satisfaction of her whole Dower, and afterw. the Husb. dies, in that Case if the Wife waves the Land convey'd to her Use after her Marriage she shall have the Land convey'd to her before the Marriage, and her Dower also in the Residue; for Land convey'd to a Woman (g) in Part of her Joynture, or in Satisfaction of Part of her Dower, is no Bar (for the Uncertainty) of any Part of her Dower. As if the Debtor gives the Creditor an Horse or any other Thing in Satisfaction (h) of Part of his Debt, it shall be a Bar for no Part for the Uncertainty. Also the Words of the Act are, For the Joynture of Wives, and not for Part of their Joyntures.

The 4 Point

(d) Co. Lit. 34. b. Plowd. 396. b.

(e) Co. Lit. 34. b. Co. 27. a. 28. a. b. Plowd. 396. b. Dyer 61. pl. 31. B. N. C. 421. Goldsb. 84. 85.

(f) Co. Lit. 36. b. Cawly 214.

(g) Co. Lit. 36. b.

(h) Doct. pla. 15.

Fifthly, it was resol'd, that altho' in the Case at Bar the Estate of the Wife was upon exprefs Condition to perform his Will, which imports a Consideration of the making of the Estate, yet it may be (i) averr'd to be for the Joynture of the Wife, for the one Consideration stands well with the other, and altho' it is not exprefs'd in the Deed, yet it may be averr'd, as the L. Dyer said it was adjdg'd in the like

The 5 Point

(i) Owen 33. Co. 26. a. b. 2 And. 46. 47.

(a) Moor 495, 505.
 1 Co. 176. a.
 B. N. C. 182. N.
 Bend. 39. 2 And.
 46, 47. 2 Roll.
 781. 2 Inst. 672.
 Owen 33. Raym.
 47, 50. Bendl. in
 Kelw. 208.
 3 Co. 51. a. 7 Co.
 39. a. 11 Co. 25. a.
 Cart. 140. Palm.
 214, 215, 506, 507.
 2 Rol. Rep. 68.
 (b) Dyer 317. pl. 7.
 B. N. C. 421.
 Dyer 248. pl. 78.
 (c) Bridgm. 136.
 Co. Lit. 326. b.
 10 Co. 37. a.
 (d) Co. Lit. Sect.
 360. Co. Lit. 223. a
 206. b. 8 H. 7. 10. b
 21 E. 4. 47. a.
 Dr. and Stud. 39.
 123. 6 Co. 41. b.
 Br. Condi. 82, 135
 23 H. 7. 23. a.
 21 H. 7. 8. a.
 Br. Prerog. 102.
 21 H. 7. 11. a.
 Plowd. 77. a.
 21 H. 6. 33. b.
 5 Co. 56. 3.
 Hob. 170.
 (e) Co. Lit. 36. b.
 Angra 2. b.
 (f) Dy. 248. pl. 78

Cafe between *Villers* (a) and *Beaumont*, in the Time of *Q. Mary*, which you may now see in his Rep. 4 & 5 *Phil. & Mar.* 146. And in the Cafe at Bar the Cafe is stronger, because the Averment is given by the said Act of 27 H. 8. by the Words in the Act, For the Joynt. of the Wife; and in this Cafe the *L. Dyer* said that the Cafe of 6 E. 6. (b) *Br. Dower* 69. was misreported; for true it is, that it was resolv'd, that an Estate in Fee simple conveyed to the Wife, was no Joynture within the Stat. but that is to be intended within the Stat. of (c) 11 H. 7. 20. which restrains the Alienations of Women, which Act neither in the Letter nor in the Meaning can be intended when a Woman has an Estate in Fee simple; for to restrain (d) such Estate that it shall not be aliened, is repugn. and against the Rule of the Com. Law and utterly out of the Letter and Intention of the Act: But he said, that an Estate in Fee simple conveyed to a Woman for her Joynture, and in Satisfact. of her Dow. is a Joynt. within the Equity of the said Act of 27 H. 8. for that is a (e) competent Livelihood to the Wife of an Estate of Freehold; to take Effect immedia. after the Death of the Husb. for all the Wife's Life and more: And the *L. Dyer* said, it was so resolv. in *Sir Morris Dennis's* Cafe, which Cafe is now reported 8 *Eliz. Dyer* (f) 248. And he said, that the Reason reported by *Brook*, that a Fee simple is no Joynture within the said Act of 27 H. 8. is because such Joynture is not mentioned in the Statute but that is no Reason in Law for 3 Reasons. 1. Because the principal Cafe at Bar, and divers other Cafes put before were out of the Words of the Act, and yet were within the Equity and Intent of the Act. 2. It agrees with the Descrip. of a Joynt. agreed and resolv. befo. 3. He said, this Estate in Fee simp. was within the express Let. of the Act, for the Words of the said Proviso are; for *Term of Life, or otherwise in Joynture*, which Word (*otherwise*) extends to all other Estates conveyed to the Wife not mentio. befo. in the Act, which are as, or more, beneficial to the Wife than the Estates beforemen. for all other Estates which are as benefici. to the Wife, or more, as the Estates ment. in the Act, are within this Word (*otherwise.*) For *nota*, this Word (*otherwise*) is not indefinite, but *otherwise* in Joynt. *id est* for a Joynt. which is as much as to say, *otherwise*, having all the Effect of the Incidents to a Joynt. implied in the said five Examp. or more: And if an Estate for Life, in Tail, or Fee simp. is convey'd to the Wife for her Joynt. and after the Death of the Husb. she is evicted, she shall recov. Dow. to the Value in the Residue, and shall have but an Estate for Life, of what Estate soever her Joynt. is by an express Proviso in the said Act of 27 H. 8. So that upon Evict. no greater Prejudice shall accrue to the Terre-tenant, if the Joynt. is of any Estate of Inheritan. than if it was but only for

for Term of her Life. And afterwards Judgment in the principal Case was given against the Demandant. *Nota* Reader, in the said Case reported by the Lord *Brook*, it is further said, That a Devise (a) of Land by the Husb. to the Wife by Will, is no Bar of her Dower, for it is a (b) Benevolence, and not a Joynture, *per Justiciar* as it is there reported; and that is good Law, if it is well understood. And as to that some have said, That no Estate devised by Will can be a Joynture within 27 H. 8. for two Reasons. 1. That by the said Act of 27 H. 8. the whole Estate of the Feoffees was transferr'd to *Cestuy que use*, and *per consequens* no Land after the making of that Act was devisable 'till the Stat. of 32 H. 8. and therof. a Devise of Land, which then by the Law could not be made, can't be within the said Act of 27 H. 8. The other Reason was, because every Joynture intended within the Act of 27 H. 8. is made and assur'd either before, or during the Coverture, as appears by the said Act, but a Devise takes its Effect after the Husband's Death: But that neither of these is any Reas. in Law, appears by the Resolution following, *Mich. 38 & 39 Eliz.* between *Leak* and *Randall* in the Court of Wards, it was resolved by the two Ch. Justic. & 101 Cur. That if a Man devises Land to his Wife for Term of her Life (c) generally, it can't be averred to be for the Joynt. of the Wife, and in Satisfaction of her Dower for two Reasons. 1. Because a Devise implies a Considerat. in itself, and therof. as a Devise can't be averr'd to be to the Use of another, than of the Devisee, unless it is express'd in the Will, no more can a Devise be averred to be for a Joynture, unless it is so express'd in the Will. But as it is said in the said Case of 6 E. 6. it shall be taken for a Benevolence, and so is the said Case of 6 E. 6. to be intended. 2. The whole Will concerning Lands by the Statutes of 32 & 34 H. 8. ought to be in writing, and no Averment ought to be taken out of (d) the Will, which can't be collected by the Words contain'd in the Will. But if a Man devises Land to a Woman for Term of her Life, or in Tail, &c. for her Joynt. and in Satisfact. of her Dower, it was resol. that it is a Joynt. within the Act of 27 H. 8. for as an Estate for Life made to a Woman for her Joynt. before Marria. when she is not his Wife, is within the Equity of the said Act, so an Estate for Life devis'd to a Woman for her Life, which takes Effect after his Death, when the Marriage is dissolv'd, is also within the Equity of the said Act, for such Estate well agrees with the Intent of the Makers of the said Act of 27 H. 8. and with the said Description of a Joynture made by the Justices in the said Case of *Vernon*. And altho' Land was not devisable 'till 32 H. 8. yet it is frequ. in our Books, that an Act made of (e) late Time shall be taken within the Equit. of an Act made long Time bef. As the

(a) Moor 37.

(b) B. N. C. 427.
Dyer 248. pl. 78.
Postea 4. 2.Mich. 38. & 39.
Eliz. inter Leak
and Randall, in
Curia Wardo-
rum.(c) Co Lit. 36. b.
Winch. 100.
Cawly 224.(d) 5 Co. 68. 2.
Larch 42. Jenk-
Cent. 115. Cro.
Eliz. 498. Mo. 222.
2 Bull. 177, 178.
Bridg. 135.
Godb. 432. Lit.
Rep. 188. Hurst.
Arg. 49, 50.
Raym. 410, 411.
2 Leon. 70.(e) Plowd. 127. a.
82. b. 2 Inst. 35.
322. Godb. 79.
2 Brownl. 115.
Cro. Eliz. 177.
1 Jones 188, 281.

Statute of *Marlebridge*, which was made *Anno 32 H. 3.* gave the Wardship of the Heir of the Tenant who held by Knights Service, notwithstanding a Feoffment made by Collusion, at which Time, and by 200 Years and more, that is to say, till the Stat. of (a) 4 H. 7. c. 17. which gave the Wardsh. of the Heir of *Cestuy que use*, the Heir of *Cestuy que use* was not in Ward; and yet it is held in 27 H. 8. g. a. b. that if *Cestuy que use* after the Statute of (a) 4 H. 7. makes a Feoffment in Fee by Collusion to defraud the Lord of his Ward, it is taken within the Equity of the Stat. of *Marleb.* Also the Stat. *de Donis Conditionalibus* made 13 E. 1. as to the Warranty of Tenant in Tail with Assets, is taken within the (b) Equity of the Stat. of *Gloucester*, c. 3. made *anno 6 E. 1.* as it is held in 11 E. 2. garr. Stat. & 43 E. 3. 23. b. For *Formedon in Descender* was given in lieu of a *Mortduncester*. So the Stat. of W. 2. cap. 25. made 13 E. 1. gave a Certificate, but gave no Adjournment, but (c) Adjournment is taken by Equity of the Statute of *Magna Charta*, cap. 13. made 9 H. 3. as it is held 12 H. 4. 9. b. So the Statute of 7 R. 2. gave Assise in *consensio Comitatus*; and (d) *Reddisseisin* taken by Equity of the Statute of *Merton*, c. 3. made 20 H. 3. Vide 1 E. 3. 25. b. & 12 Eliz. Dyer 289. The Bishop (e) of London being one of the High Commissioners, by Force of the Act of 1 Reg' Eliz. was translated to the Archbishoprick of York, yet his Authority remain'd by Force of the Act made *anno 1 E. 6. cap. 7.* and with this Resolut. (f) in *Leak's Case* aforesaid agrees the Case reported by the L. Dyer 5 Reg' Eliz. 220. (g) A Man seised of certain Land in Fee, held in Socage, and of other Land in Tail held *in Capite*, devised by his Will in Writing the third Part of all his Lands to his Wife in Recompence of her Dower, and dy'd; the Wife entred into the third Part of the Land in Fee simple; and it was resolv'd, that it should be a Bar of her Dower by the said Act of 27 H. 8. *in Curia Wardorum.* *Nota* Reader, a good Difference, and all the Opinions, which seem to disagree, well reconcil'd.

Know Reader, that by subtil and sinister Counsel, an Evasion out of the said Act of 27 H. 8. (as was intended) was devised, How Women might have Joyntures and Dowers also notwithstanding the said Act, and the Invention was such: One *Christian* who was the Wife of one *Richard Melles* of the County of *Suffolk*, had a Joynture made of an House and certain Land in *Stoke Nayland* in the County of *Suffolk*, to her Husband and her, and to the Heirs of the Body of the Husband, by one *John Melles*, Uncle of the said *Richard*; which *Richard* was seised in Fee of divers other Lands in the same Town, and afterw. *Rich.* dy'd; the Wife with certain of her Friends of her Confederacy, in a secret Manner entred into the said Tenements convey. to her, and claim'd them for her Joynt. and yet wav'd the Possession, and brought a Writ of Dower

(a) 12 H. 7. 19. 20.

(b) Plowd. 127. a. 178. b. 3 Co. 52. b. Co. Lit. 365. a. Plowd. 100. a.

(c) Fitz. Adjorn. 3 Br. Adjorn. 3.

(d) Co. Lit. 154. a. 2 Inst. 82. 83. F. N. B. 188. b. (e) Dyer 289. 290. pl. 60.

(f) Antea 4. a.

(g) Dyer 220. pl. 12 Hob. 33. 34.

Dower to be endow'd of the whole, as well of that which was assign'd to her for her Joynture as of the Residue of her Husband's Lands and Tenements, and had a full third Part of the whole (accounting the Land convey'd to her for her Joyn. to be Parcel) assign'd to her by the Sheriff for her Dower (not knowing the Practise) only out of the Residue: And when she had her Dower, then she openly entred into the House and Land convey'd to her for her Joyn. who was held out by *Tho. Purslow*, the Terre-tenant, and afterwards she marry'd one *John Sharp*, who brought an Action of Trespals against the said *Tho. Purslow*, for a Tresp. done to *Junii, anno 18 Eliz.* in the House and Land convey'd in Joynture. And *Purslow*, by the Advice of one of the *Inner-Temple* pleaded the Feoffm. of the said *Rich.* to him and justify'd. To which the Plaintiffs reply'd, that before *Richard* had any thing, the said *John* was seised, and gave to her Husband and her *ut supra*. To which the Def. re-joyn'd, that the Estate made to *Richard* and *Christian* was for the Joynt. of *Christian*. and that after the Death of her Husb. and before the Tresp. she brought a Writ of Dower against the Def. then Tenant of all the Land whereof her Husband was seised, and demanded the third Part of all recover'd, and had Execution out of the Residue, and averred, that the House and Land which was Parcel of the Land convey'd to her for her Joynture, was no Part of the Land assign'd to her for her Dower. To which the Plaintiffs surrejoyn. that the said *Christi.* after the Death of her Husband, and before the Writ of Dower brought, enter'd into the said House, claiming it for her Joynt. To which the Def. by way of Rebutter said, That to say that the said *Christian* after the Death of her Husband, and before the Writ brought, had entred, they should not be admitted against the said Record of Recov. in the said Writ of Dower: Upon which the Plaintiffs demurr'd in Law, and it was argued by the Plaintiff's Counsel, that first, this bringing of the Writ of Dower, can't be any Wayver of the Estate of the Wife, because by the Entry of the Wife, she has agreed to the said Estate, and was actually seised; and therefore she can't afterwards wave and divest it out of her by the bringing of the said Writ of Dower. To which it was answ. by the Def. Counsel, That admitting the Wife could not wave it, yet she might well bar and conclude herself from claiming the said Estate, in this Case she has (a) estopped herself to claim any Estate in the House and Land, in which, &c. For when she brings her Writ of Dower, and has (b) Judgment to have the 3d Part of the whole, by that she affirms, that she has only Title of Dower, and *per consequens* no Estate, *ergo* she is estopped to claim any Estate, in any Part of that whereof she has demanded by her Writ to be endowed; as if the Husband discontinues the Wife's Land, and dies, and the Wife brings a Writ of Dower against

(a) 1 Roll. 862.

(b) Cr. Eliz. 128.
1 Leon. 136, 137.
138. Owen 154.

(a) Owen 154.
26 H. 8. 2. a.
F. N. B. 194. b.

(b) 1 Roll. 862.

(c) 4 Co. 41. b.
3 Bulst. 65.

against the Discontinuee, and recovers the third Part, she is thereby estopped to bring a (a) *Cui in vita*, for by her Writ of Dower she claim'd Title of Dower only, and thereby she shall be estopped to claim any other Right by *Cui in vita: Vide* 10 E. 3. Double Plea 8. 20 E. 3. Scire fac' 13. F. N. B. 194. 17 Aff. 3. Acceptance of Dower by Deed indented, concludes the Wife of her Right, *vide* 11 H. 7. 20. b. So if she had brought her Writ of Dower to be (b) endow'd of the Residue only, and had recover'd her Dower thereof, she should be estopped to claim any Estate in the said House and Land so convey'd to her, altho' she had entred before; for by the bringing of her Writ of Dower to be endowed of the Residue, she has *tacite* affirm'd, that she has not agreed to any Joynture made to her; for then she can't bring any Writ of Dower by the said Act of 27 H. 8. And if the Law should be otherwise, great Inconvenience would ensue, which by no Industry or Policy can be prevented, as appears before: And for these Reasons it was concluded, That the Plaintiffs were in any Case concluded from claiming the said House and Land in which, &c. *Quod fuit concessum per Sir Christopher Wray, Chief Justice, Sir Thomas Gawdy, & totam Curiam. Nota Reader, Simplicitas est legibus amica, & (c) nimia subtilitas in jure reprobatur.*

Michaelis 27. & 28. Eliz. Reginæ, Rot. 1739.

BEVILL'S Case.

Nicholaus Franciscus attachiatus fuit per breve Dom. Re-^{Comub. ff.}gin' de secunda Deliberatione, ad respondend' Waltero Parker de placito quare cepit averia ipsius Wal. & ea injuste detinuit contra vadios & pleg. &c. Et unde idem Walter' per Franciscum Eyrman Attornatum suum queritur quod præd' Nicholaus tricesim' die Octob' anno regni dom' Regin' nunc quinto decimo, apud Tallan in quodam loc' voc' Newton, cepit averia, videl. duos Boves ipsius Walteri, & ea injuste detinuit, contra vadios & plegios quousque, &c. unde dic' qd' deteriorat' est, & dampn' habet ad valenc' viginti librar'; & inde produc' festam, &c. Et præd' Nicholaus per Willihel-
mum Leigh attornat' suum venit & defendit vim & injuriam quando &c. Et ut ballivus Johan' Bevill armiger, bene cogn' ^{Doct. pla. 291.}caption' averiorum prædictorum in præd' loco in quo &c. Et juste &c. Quia dicit quod idem locus vocat' Newton in quo supponit' captionem averiorum prædictorum fieri, continet & prædict' tempore Captionis averiorum prædictorum superius fieri supposit' continebat in se vigin' acras terræ cum pertin' in Tallan præd' quodque diu ante præd' tempus quo &c. quidam Robertus Smith senior armiger fuit seisit' de eisdem viginti acris terræ cum pertinen' in dominico suo ut de feodo, & easdem viginti acras terræ cum pertinen' tenuit de præfat' Joh' Bevill ut de manerio suo de Keligath in com' præd' per servicium militar', videlicet per homag', fidelitatem, & ad scutagium dom' regin' cum acciderit quadragint' duos solidos, & ad plus plus, & ad minus minus; ac etiam per Servic' faciendi festam ad Curiam ipsius Johannis Bevill maner' sui prædict' bis per annum, viz. semel infra unum mensem proxim' post festum Sancti Mich' Archangeli, & iterum infra unum mensem prox' post festum Pasch' quolibet anno apud manerium illud tenend'

nend' de quibus servic' prædict' Johan' Bevill fuit feisit' per manus præd' Rob' Smith senioris, ut per manus viri tenentis sui, viz. de homagio, fidelitate, scutagio, & sect' cur' ut de feodo & jure: Posteaque prædictus Robertus Smith senior, obiit de prædictis viginti acris terræ cum pertinentiis feisit' post cujus mortem prædict' viginti acra terræ cum pertinentiis descend' cuidam Roberto Smith, ut filio & Hæredi prædicti Roberti Smith, per qd' idem Robertus Smith filius ante præd' tempus quo &c. in præd' viginti acras terræ cum pertinentiis intravit, & fuit inde feisit' in dominico suo ut de feodo. Et quia homagium prædict' Roberti filii prædicto tempore quo &c. præfat' Joh' Bevill aretro in fact' fuit, idem Nicholaus ut Ballivus ejusdem Johannis Bevill bene cogn' captionem averior' prædict' in præd' loco quo &c. Et juste &c. pro homagio illo sic in fact'o ut in terris de ipso Johanne in forma prædicta tent' &c. Et super præd' Robertum filium, ut super verum tenentem prædict' Joh' Bevil, & infra feodum & dominicum suum &c. Et prædict' Walterus dic', qd' diu ante prædictum tempus captionis averiorum illorum fact', prædictus Rob' Smith filius fuit feisit' de præd' viginti acris terræ cum pertin' in Tallan prædicta vocat' Newton, in dominico suo ut de feodo; & sic inde feisit' existens, ante prædictum tempus captionis prædict' fact', scilicet vicesimo quarto die Januarii anno regni domine Regine nunc tertio decimo, apud Tallan præd' inter alia dimisit prædict' viginti acras terræ cum pertinent' eidem Walt' habend' eidem Waltero & assign' suis a prædict' vicesimo quarto die Januar' an' supradict', usq; finem termin' quinque annorum extrinse prox' sequent' & plenar' complend'; virtute cujus dimission' idem Walterus in præd' viginti acras terræ cum pertinent' intravit, & fuit & adhuc est inde possession', reversion' inde post terminum prædictum finitum præfat' Rob' Smith filio & hæred' suis spectan' sine quo quidem Robert' filio eidem Walter' non potest præf. Nicholao ad cogn' suam præd' respondere, nec placitum inde in judicium deducere: Et petit auxilium de præfat' Roberto Smith filio, qui presens est hic in cur' in propria persona sua, & gratis se jungit præfat' Waltero in auxilium versus præfatum Nicholaum de præd' placito &c. Et super hoc tam idem Walterus quam prædict' Robertus Smith filius, qui &c. dic' quod prædictus Nicholaus caption' præallegat' captionem averiorum prædictorum in præd' loco in quo &c. justam cogn' non debet, quia protestando qd' prædictus Robertus Smith filius præd' tempore captionis averior' præd' fact', non ten' præd' vigint' acras terræ cum pertin' voc' Newton in Tallan præd' de præfat' J. Bevill, ut de maner' suo de Keligath per servicium militar', viz. per homagium; fidelitatem.

litatem, & ad scutagium dom' Reginae cum acciderit 42s. & ad plus plus, & ad minus minus, &c. Nec non per servitium faciendi festam cur' ipsius J. Bevill manerii sui præd' bis per an' viz. semel infra unum mensem proxim' post festu' S. Michaelis archangeli, & iterum infra unum mensem proxim' post festu' Pasch, quolibet anno apud maner' illud tenend' prout præd' Nich' superius allegavit: Pro placito dic' qd' præd' J. Bevill nunquam fuit seifitus de præd' servitiis, prout prædict' Nich' superius allegavit. Et hoc parati sunt verificare, unde ex quo præd' Nich' captionem averiorum prædict' in præd' loco in quo, &c. superius cogn' idem Walter' & præd' Rob' qui &c. pet' judicium, & dampna sua occasione captionis & injustæ detentionis averior' præd' eidem Walt' adjudicari. Et præd' Nich' ut prius dic' qd' præd' J. Bevill fuit seifit' de præd' servitiis per manus præd' Rob' Smith patris ut per manus veri tenentis sui, prout ipse superius allegavit. Et de hoc non se super priam, & præd' Walt' & Rob' Smith, filius, qui &c. similiter. Ideo præcept' est vic' qd' venire fac' hic a die S. Mart' in 15 dies, 12, &c. per quos &c. Et qui nec &c. de recogn' &c. quia tam &c. Profess' cont' Jur' ad triand' exit' præd' continuatur usque quindenam Paschæ, anno 19 Eliz. Reginae, nisi Justic' ad assisas in com' præd' capiend' assign' per formam statuti &c. die Lunæ in quinta septimana quadragesimæ eodem anno 19, prius venissent, ad quas quidem assisas veredict' reddit' fuit ut sequitur. Jur' dic' super sacrament' suum, quod infranominatus Robertus Smith pater tenuit tenementa infra script' cum pertinentiis vocata Newton de infranominat' J. Bevill, ut de infra script' manerio de Keligata per servitium militare infra script'. Et qd' idem J. Bevil fuit seifit' de fidelitate & fest' cur' tantum parcel servitior' infra per manus præd' Rob' Smith patris ut per manus veri tenentis sui: Sed utrum præd' seifin' fidelitatis & fest' cur' præd' sit bona & sufficiens seifina integror' servitior' infra script' necne, iidem jur' penitus ignorant, & pet' inde advisament' & discretion' justic' præd'. Et si super tota materia præd' in forma præd' comperta, videbitur eisd' justic' qd' præd' seifin' fidel' & fest' cur' non sit bona & sufficiens seifina integror' servitior' præd' tunc iidem jur' dic' super sacramentum suum qd' præd' J. Bevil non fuit seifit' de infra script' servitiis per manus præd' Rob' Smith patris ut per manus veri tenentis sui, prout præd' Walt' interius allegavit, & tunc affid' dampna ipsius Walt' occasione caption' & injustæ detention' aver' infra, ultra mis' & custag' sua per ipsum circa fest' suam in hac parte apposit' ad duodecim denar', & pro mis'. & custag' illis ad quadraginta solidos, & si super tota materia prædicta

in forma præd' compert' videbitur eidem justic' qd' eadem seifina de fidelitate & sect' cur' præd, sit bona & sufficiens seifina integror' servitior' infra' tunc iidem Jur' dic' super sacrament' suum præd' qd' præd' J. Bevill fuit seifit' de servit' infra' per manus præd' R. Smith patris ut per manus veri tenentis sui prout præd' Nic. interius allegavit, & tunc assident dampna ipsius Nic. occasione præmiss' ultra mis' & custag' sua per ipsum circa sectam suam in hac parte apposit' ad 12 d. & promif' & custag' illis ad 40 s. Et quia Justic' hic se advisare volunt de & super præmiss' priusquam judicium inde reddant, dies dat' est partibus præd' hic usq; in crastino Sanct' Trinit' de audiendo inde judicio suo, eo qd' iidem just' hic inde nondum &c. Et sic placitum præd' continuat' fuit usq; crastinum Sanct' Trinitat' anno 25 Eliz. Regina: Quo die judicium reddit' fuit ut sequitur; ad quem diem hic ven' tam prædict' Walterus Parker per attorn' suum præd', quam præd' Nich' Frauncis per Will' Aylesbury attorn' suum, & super hoc visis præmissis, & per justic' hic plene intellectis, videtur justic' hic qd' præd' seifin' fidelitatis & sect' cur' præd' est bona & sufficiens seifina integrorum servitiorum præd': Ideo concess' est qd' præd' Walt' Parker nihil capiat per breve suum præd' sed sit in mi'a pro falso clamore suo; & præd' Nich' Frauncis eat inde sine die. Et habeat retorn' averior' præd' detinend' sibi irreplegiabl' imperpetuum &c. Concessum est etiam qd' prædict' Nich' Frauncis recuperet vers' præf' Walt' Parker dampna sua præd' ad 41 s. per jur' præd' in forma præd' assessa; necnon 13 l. eidem Nich' Frauncis ad requisitionem suam pro mis' & custagiis suis prædict' per cur' hic de increment' adjudicat': Quæ quid' dampna in toto se attingunt ad 15 l. & 1 s. &c.

In Replegiare in Comuni Banco, Michaelis 17 & 18 Eliz. Rot. 1739.

BEVILL'S Case.

Between *Walter Parker*, Plaintiff, and *Nicholas Frauncis*,¹ *Anderl. 5748.*
 Def. for taking of his Cattle in *Tallan* in the County of
Cornwall, in a Place call'd *Newton*; the Defendant made Con-
 nusans as Bayly to *John Bevill*, Esq; by Reason that the Place
 where, &c. contain'd 20 Acres, whereof one *Robert Smith*
 was seised in Fee, and held them of the said *John Bevill*,
 as of his Manor of *Keligath* in the said County, by Knights-
 Service, viz. by Homage, Fealty, and Escuage, scil. when
 Escuage runs to 40 s. 40 s. and when to more, more, and
 when to less, less, and by Suit of Court *bis per annum*, of
 which Services he was seised by the Hands of the said *Robert*
Smith, as by the Hands of his very Tenant, and made Con-
 nusans for Homage: And Issue was taken that the said *John*
Bevill nunquam fuit seisius de prad' servitiis, prout the said *Ni-*
cholas had allעד'g'd. And the Jury gave a special Verdict,
 that the said *John Bevill* was seised of the Fealty only, &c.
 And if the Seisin of Fealty was a sufficient Seisin of all the
 Services was the Doubt, which the Jurors refer'd to the
 Consideration of the Court. And this Point was made one
 of the principal Points in the Serjeants Case, which was
 argu'd by *Popham*, *Rhodes*, *Fenner*, *Shute*, and *Gawdy*, Ser-
 jeants, and *Windham* and *Anderson* the Queen's Serjeants,
Pasch. 21 Eliz. the Record and Pleading of which Serjeants
 Case is entred, *Hill. 20 El. Rot. 1745.* And this Case at
 Bar was many Times argu'd in the Time of Sir *James Dyer*,
 and after his Death, after many Arguments at the Bar and
 Bench, was adjudg'd, by *Anderson* Chief Justice, *Mead*,
Windham, and *Periam*, That the Seisin of the Fealty was
 (a) Seisin of all the said Services, and therewith agree
 44 E. 3. 11. b. 8 H. 6. 16. and the Reason was, That when the
 Tenant

(a) Co. Lit. 68. a.
 45 E. 3. 28. a.
 Br. Avow. 245. 2.
 Fitz Avow. 71.
 8 H. 6. 17. b.
 Postea 8. b.

(a) Lit. Sect. 97.
Co. Lit. 67. b.

(b) 44 E. 3. 11. b.
Co. Lit. 68. a.
45 E. 3. 28. a.
Br. Avow. 24, 52.
Fitz. Avow. 71.
3 H. 6. 17. b.
Antea 8. a.
(c) 2 Brownl. 99
Lit. Sect. 85.
Co. Lit. 68. a.
64. a.
(d) 2 Brownl. 99.
Co. Lit. 68. a.

(e) 42 E. 3. 26. a.
Fitz. Avow. 67.
27 Ass. 51.
Br. Distr. 34, 36.
29 E. 3. 24. a.
2 Inst. 106, 107.
1 Rol. 674.
Fitz. Avow. 250.
2 Brownl. 99.
11 Co. 44. a.
13 Co. 2.
(f) 9 Co. 35. a.
Hurt. 50.
Winch. 31.
10 H. 7. 15. a.
Co. Lit. 153. a.
315. a.

(g) Co. Lit. 68. a.

(h) 2 Roll. 463.
(i) Kéiw. 3. b.

Tenant does Fealty, he takes a corporal Oath, that he will be faithful and true to the Lord, and bear Faith (a) to him for the Tenements which he claims to hold of him; and that he will lawfully do the Customs and Services which he ought to do, so that the doing of this Service (by which he swears to do all Services) is sufficient (b) Seisin of all. And true it is that *Lit-tleton* says, That Homage is the (c) most Honourable Service, and the most humble Service of Reverence that a Freeholder can do to his Lord: But also it is true, that Fealty is a more (d) sacred Service than Homage; for that is done upon Oath, and the other not; And it is to be observed, That these Words *scil.* (will be faithful and true to him, and bear Faith to him for the Tenements which he claims to hold of him) are also Parcel of the Words in doing of the Service of Homage, and Seisin of Part of any Service is Seisin of the whole, as after appears. And that is the Reason that the Law makes so great Account of the Seisin of these Services of Homage and Fealty; for the Seisin of them (because it is the Seisin of all other Services) is so inestimable in Law, that no Distress for them of any Goods or Chattels (of what Value soever) is in Judgment of Law, (e) excessive; and altho' the Lord often distresses for them, so that the Tenant can't till his Land, yet the Tenant shall not have *Affise de multiplici districtione*, as he shall have for Rent or other Profits. *Vide* 28 Ass. 50. 11 H. 4. 2. a. 42 E. 3. 26. a. *Br. Distr.* 80. And in this Case these Points were also resolv'd.

1. That Seisin of superior Service is (f) Seisin of all inferior Services which are incident to it; as Seisin of Escuage is Seisin of Homage and Fealty, and Seisin of Homage is Seisin of Fealty, and Seisin of the Rent is Seisin of the Fealty where the Seignory is by Fealty and Rent, *Vide* 3 E. 2. *Avowry* 188. 5 E. 2. *Avowry* 209. 9 E. 2. *Monstrans des faits* 41. 19 E. 2. *Avowry* 224. 7 E. 4. 28 & 29. 13 E. 3. *Avow.* 103. 21 E. 3. *Avowry* 115. 27 H. 8. 21. a. *Pasch.* 1 & 2 *Ph. Mar. in Communi Banco*, Rot. 329. It was adjudg'd, That where the Seignory is by Fealty and Rent, that Seisin of the Rent is Seisin of the Fealty, and so is the Book adjudg'd in 29 E. 3. 31. a. and with that agrees 3 E. 2. *Avowry* 188. 2. It was resolv'd, that the doing of Homage is (g) Seisin for all Services, as well inferior as superior, because in doing of Homage, he takes upon him to do all Services, and therefore his Service is sufficient Seisin of all the Services. And therewith agrees 13 H. 4. 5. b. Seisin of Homage is Seisin of Escuage, which is superior, and of Relief, which is inferior, 22 Ass. 66. Payment of 1 d. in the Name of Attornment of the whole, may be sufficient Seisin of (h) 4 Rents. 3. That Seisin of Rent, or (i) Suit, or other Service which is Annual is sufficient Seisin of Escuage, Homage, Fealty, Ward, Relief, Heriot-Service, Service to cover the Hall of

PART IV. BEVILL's Case.

c

of the chief House of the Manor, or for impaling the Lord's Park, or such casual Services, which perhaps will not happen in 40, 60, or 70 Years; and therefore there is great Reason that Seisin of annual Services shou'd be Seisin of all such casual Services, and therewith agrees, 20 E. 3. *Avowry* 131. that Seisin of Rent, and other annual Services, is Seisin of Relief, and other Services casual or accidental, and 7 E. 6. *Br. Card* 69. & *Avowry* 69. that it was agreed by the Justices of both Benches, that where the Seigniority is by Knights-service and Rent, that Seisin of the Rent which is annual and inferior to all the other, is a good Seisin, to have the Wardship of the Heir of the Tenant; and therefore the Opinion of *Brook* there, that it shall not be a Seisin to make an Avowry is not Law: for the Case of the Ward is the stronger Case. But it was said, That Seisin of one annual Service is not Seisin of another annual Service; As if there be Lord and Tenant by Fealty, 10 s. Rent, and three Work Days by the Year, Seisin of the Rent is not Seisin of the Work Days; nor seisin of Rent is not Seisin of Suit of Court which is annual, *vide* 16 *Eliz. Dyer* 330. and the Reason is, because it shall be accounted the Folly of the Lord, that he does not get Seisin of that which is due yearly, and it would be mischievous to the Tenant, for perhaps the Work Days were discharged in ancient Times, which now can't be shewed, upon which Suits and Troubles wou'd ensue. But *nota* Reader, that all this which has been said, is to be intended of Seisin in Law, and not of actual Seisin; For Seisin of Fealty in the Case at Bar is no actual Seisin of Homage, nor of Suit of Court, nor Seisin of Fealty is no actual Seisin of Rent. *Vide* 8 H. 7. 17. 20 H. 3. *Affise* 433. 40 E. 3. 22. ^{49 E. 3. 15. b.} ^{Co. Lit. 153. a.} ^{315. a. 2 Rol.} ^{403. 6 Co. 57. 2.} 49 *Aff.* 6. 44 E. 3. 11. *Br. Seisin* 40. But Seisin of any Part of any Service, is actual Seisin of the whole to have Affise. *Vide* 5 E. 4. 2. b. 12 E. 4. 7. 8 E. 3. 13. a. 8 *Aff.* 4. 44 E. 3. 32. 3 E. 3. *Affise* 175. and as to avow, Seisin in Law is sufficient, but as to have Affise, actual Seisin is requisite; so the Seisin which is requisite in a Writ of Right of Land, ought to be actual and not Seisin in Law, as appears 35 E. 3. *Droit* 30. & *Litt. lib.* 3. *cap. Releases* 112. agrees thereto. If a Man makes a Lease for Life, or a Gift in Tail, yielding the first Year a Quarter of Wheat, and afterwards the yearly Rent of C. s. Seisin of the Wheat is Seisin of the Rent whereof he may have Affise, for all is but one Reservation. *Vide* 5 E. 4. 2. 44 E. 3. 11. b. 15 E. 3. *Exec.* 63. it is said, that in the same Case all is one Freehold, and Seisin of the one is the Seisin of the other to have Affise, which was affirmed to be good Law. It was also said, if a Mesnalty becomes Rent-secck by Surplufage, the ancient Seisin is sufficient; For the Mesnalty is extinct by the Act of the Lord and of the Tenant paravail, and the Nature

Dyer 330. pl. 19.

Kelw. 164. a. Plowd. 154. b.

Cr. Car. 82. Jones 24.

of the Rent of the Mesne is not altered by his own Act, but by the Act of others. And therefore altho' the Rent is become feck, yet he shall (a) distrein for it, as is said in 2 E. 2. *Extinguishment*, 6. *vide* 31 *Aff.* 23. 26 H. 6. *Extinguishment* 7. 7 *Aff.* 2. 2 E. 3. 42. 20 E. 3. *Avowry* 126. *vide* 50 E. 3. 26. a Presentation to a Prebend which is after changed into a Treasury, shall serve to maintain a *Quare impedit* upon Disturbance to the Treasury. But if there be Lord and Tenant by Fealty and Rent, and the Lord grants over the Fealty saving the Rent; Or if a Man makes a Gift in Tail, or a Lease for Life, rendering Rent, and grants over the Reversion, excepting the Rent, in these Cases the Nature of the Rent is altered by his own Act; and therefore the ancient Seisin when it was a Rent-service will not serve, when by his own Act the (b) Nature of the Rent is altered; and Assise of any Rent-feck he can't have, for he was never seised of any such Rent; yet such Rent-feck which was once Rent-service seems to be apportionable by the Book in 32 *Aff.* 10. Return irreplevifable is a good Seisin of Rent, as it is held 2 H. 4. 23. for otherwise the Tenant might defeat the Lord of his Seigniorie, and the Lord would never attain to his Services. So in Avowry for Suit, if the Lord recovers (c) Damages for the Suit, it is a sufficient Seisin, *causa qua supra*. If the Lord grants his Seigniorie upon (d) Condition, and the Tenant pays the Rent to the Grantee, afterwards the Condition is broke, and the Lord distrains for his Services, upon Rescous made he shall have Assise, for the Seisin before is sufficient. Otherwise if a Man gives Land upon Condition, the Condition is broke, the ancient Seisin is not sufficient, but he ought to enter and gain a new Seisin: But note in the Case of Rent the Distress is in lieu of an Entry. *Vide* (e) 15 E. 3. *Assise* 95. & 15 *Aff.* 12. *quod vide Brook Seisin* 38. If the Disseisee releaseth to the Disseisor upon Condition, and afterwards the Condition is broke, the Disseisee shall have Assise for the first Disseisin, as appears by 17 *Aff.* 2. & 17 E. 3. 2. where in Assise of Land the Tenant pleaded the Release of the Pl. the Pl. pleaded a Defeasance of the Release upon a certain Condition, and pleaded Performance of the Condition, and so maintained the Assise, which proves that by the Performance of the Condition, and the bringing of the Assise, the Right which was releaseth upon Condition was reveseth in the Pl. for without a Right he could not have Assise, and so the ancient Seisin sufficient. If a Man grants over divers several Rents, and the Tenant attorns, and gives 1 *d.* in the Name of Seisin of all the Rents, it is a good Seisin for all to have (f) Assise, and yet no Rent was due or payable at that Time, and therewith agrees 22 *Aff.* 66. And yet if there be L. and Tenant by Fealty, and 20 *d.* Rent, and the Ld. grants

(a) Co. Lit. 153. a.
Kclw. 104. a.
7 Co. 24. b. Cr.
Car. 82. Perk.
Sect. 323. Lit.
Sect. 226.

(b) 1 Leon 266.

(c) 1 Rolls 314.

(d) Co. Lit.
202. b. 2 Rolls
465.

(e) 2 Rolls 465.

(f) Co. Lit.
315. a. 10 Co.
127. b.

grants over his Seigniory, and the Tenant pays 2 *d.* to the Grantee in Name of Seisin of his Rent, yet at the Rent Day the Lord shall have his whole Rent of 20 *d.* for the 2 *d.* can't be (a) Parcel of the Rent, for no Rent is due or payable till the Day, and yet it shall enure to this Purpose, *f.* to give Seisin of the Rent. *Vide* 34 *H.* 6. 42. *a.* 37 *H.* 6. 38. *b.* *Br. Seisin* 15. 5 *E.* 4. 2. *a.* 25 *E.* 3. 44. *b.* by *Hill.* 29 *E.* 3. 31. 22 *Aff.* 66. *Lit. lib.* 3. *cap. Attorn.* 127. *a. b.* Then it was moved, if Seisin of Fealty in the Case at Bar is Seisin of all the other Services within the Statute of * 32 *H.* 8. * *Lit. Rep.* 342. *cap.* 2. by which Statute it is provided, That none shall have a Writ of Right of the Seisin of his Ancestor or Predecessor, unless the Seisin was within (b) 60 Years before the *Teste*; nor any Writ of *Mortdancestor*, *Aiel*, *Cofnage*, or Writ of *Entry sur disseisin*, unless the Seisin was within 50 Years before the *Teste*; nor any Action of his own Seisin or Possession, unless within (c) 30 Years; nor any Avowry, or Conufans for any Rent, Suit, or Service, unless Seisin was had within 50 Years before the Avowry made: In all which four Branches this Word (*Seisin*) is spoken indefinitely, and therefore if the Act had not gone further, this Word (*Seisin*) shou'd be construed according to the Subject Matter, sometimes for actual Seisin, and sometimes for Seisin in Law; and therefore as to the Writ of *Right*, Writ of *Mortdancestor*, *Aiel*, &c. *Affise*, &c. it shou'd be intended of an actual Seisin, and not of a Seisin in Law; so that the three first Branches are to be intended only of an actual Seisin, and the fourth Branch concerning *Avowries* extends to Seisins in Law, as well as to Seisins in Fact, or actual Seisins: But the Words of the Act (upon which the Doubt arises) go farther, *f.* And be it farther Enacted, That if any Person or Persons shall sue any of the said Actions, Writs, &c. or make any Avowry, Conufans, Prescription, or Claim for any Rent, Suit, Service, or other Hereditament, and cannot prove that any of his Ancestors or Predecessors were in actual Possession, or Seisin of or in the same Lands, Tenements, Rents, Services, &c. within the Years before limited by this Act and in Manner and Form aforesaid, if it be traversed or denied by the Plaintiff, Demandant, Avowant, or by the Party Tenant, or Defendant, that after such Trial had, the Party and his Heirs shall be barred of all such Writs, Actions, Avowries, Conufans, Prescription, and Claim for the same Lands, Tenements, and Hereditaments, &c. And it was objected, that these Words (actual Possession or Seisin) exclude Seisin in Law, and therefore this Act has altered the Common Law: For altho' at the Common Law, Seisin in Law was sufficient to make Avowry, yet this Act allows only of actual Possession

or Seisin; and the Reason of it, as was said, was because actual Seisin is the sure Cognifance and Ensign of Right: But if the Seisin of the Fealty shou'd be Seisin for all the other Services, then wou'd Contention arise what were the other Services (which peradventure were never done) and which can't be known by any Seisin had of them. And therefore it was said, that this Act by exprefs Words extends only to actual Possession and Seisin, and not to relieve those who for so long Time have neglected to have actual Seisin of their Services, and especially of Suit, which ought to be done twice every Year: And it was said, that it was *Crassa & supina negligentia*, which this Law did never intend to relieve; For as it is commonly said, *Vigilantibus (a) & non dormientib' jura subveniunt*. To which it was answer'd and resolv'd *per totam Curiam*, that Seisin in Law was sufficient to make Avowry within the Intention and the Letter also of the Act; For the Intention of the Act was, to limit the Time within which Seisin ought to be had, and not to exclude any Seisin which was lawful Seisin by the Common Law, and that appears by the Preamble, for there it is said, *For as much as the Time of Limitation, &c. extend, and be so far, and so long Time past, that it is above the Remembrance of any living Man, &c.* Also the former Acts of Limitation, *scil. W. 1. cap. 38. W. 2. cap. 2. & 46.* do not exclude any Manner of Seisin which was sufficient at the Common Law. Also it is not against the Letter of the Act, for the three first Branches extend to actual Seisin, and the fourth extends as well to Seisin in Law as to actual Seisin: Then the said Words of the Act, *s. actual Possession, or Seisin* in the disjunctive, makes a Distinction between actual Possession which refers to the three first Branches, and a Seisin, be it actual or in Law, which refers to the fourth, so that actual is coupled with Possession, and Seisin is disjoyned by this Word (*or*) and stands of itself indefinitely, *& eo potius*, because the Words subsequent are, *and in Manner and Form as is aforesaid*, which Words refer actual Possession or Seisin to the said four Branches precedent, so that *reddendo singula singulis*, all stands well together. 2. It was resolv'd, That the said Act doth not extend to such Rent or Service which by common Possibility may not happen or become due within 60 Years: As if a Seign. consists of Homage (b) and Fealty only, for the Tenant may live above 60 Years after they are done; so if the Service be to cover the Lord's Hall, (c) or to go with him when there shall be War between the King and any of his Enemies, such casual Services which by common Possibility may not happen within 60 Years are not within this Act. The same Law of (d) *Formedon in Descender*, for the Tenant in Tail may live

(a) 1 Sid. 55.
 Postea 82. b.
 2 Inst. 690. 2 Co.
 26. b. Palm. 157.

(b) 2 Inst. 95.
 96. Co. Lit.
 115. a.

(c) Co. Lit.
 115. a. 2 Inst. 95.

(d) Lit. Rep.
 342. Co. Lit.
 115. a. 1 And.
 16. N. Bendl.
 194.

live 60 Years after Discontinuance, and altho' *in fact* he dies within the Time, so that the Issue may bring his *Formedon*, and altho' the Issue does not prosecute any Writ within the Time, yet the Issue may bring it at any Time, for by common Possibility the Writ of (a) *Formedon in Discontin-* (a) Kelw. 212. b. 213. a. Bendl. in Ath 24. *der* was not within the Statute, as it is adjudged in *Fitz-William's Case*, M. 10 & 11 *Eliz.* which is now reported by the Lord *Dyer* fol. 278. Also there it is said, That the Seisin of the Donee was never traversable: The same Law of Homage and Fealty, and other such accidental Services, altho' they become due within the Time limited by this Act, and by laches of the Lord no Seisin is had of them, yet he may distrain for them when he will, for they are not within the Purview of the Act: The same Law, if the Lord releases to the Tenant, as long as J. S. has Heir of his Body, and 60 Years pass, and afterwards J. S. dies without Heir of his Body; in this Case altho' the 60 Years are pass, yet he may distrain, for it was impossible that he should attain to any Seisin within that Time, & (b) *imposs-* (b) 1 Co. 98. a. 5 Co. 22. a. 6 Co. 21. b. 68. a. 8 Co. 172. b. 9 Co. 73. a. 10 Co. 139. b. Co. Lit. 29. a. Hard. 387. *tentia excusat legem.* And a Man may hold by Homage and Fealty, and they shall never be done by him. As if Land held by Homage and Fealty is conveyed to Mayor and Commonalty, or other (c) Corporation aggregate of many in this Case they hold by Homage and Fealty, but they can't do them. And therefore altho' they have enjoyed the Land above 60 Years, yet if they alien the Land, the Lord may distrain for the Homage and Fealty, *vide* 33 *H. 8. Br. Fealty* 15. And it was agreed, that the Writ of *Escheat*, (d) *Cessavit*, or Writ of (e) *Rescous* are not within this Act, for in these Writs the Seisin is not traversable, but the Tenure. Also in Writs of *Escheat* and *Cessavit* they demand the Land, and cannot alledge any Seisin in the same Land, &c. as the Statute speaks, and therefore these Writs are not within the Statute, for the Act extends only to such Writ where the Demandant or his Ancestors may have Seisin of the Land in Demand within the Time of the Limitation prescribed by the Act, and the Statute doth not compel them to any Impossibility. And it is agreed in 21 *H. 6. 22. a.* that in a Writ of *Escheat* (f) or *Cessa-* (f) *Fitz. Cessa-* vit 6. *Br. Cessa-* vit 31. *Br. Es-* plices 5. *cheat* (g) *6 E. 4. 11. b.*

in *Cessavit* Seisin is not traversable, 8 E. 3. 46. F. N. B. 209. E. vide in 10 & 11 E. Dyer 278. And altho' the L. was never seised, yet because the Seign. remains, if he distrains, the Tenant ought not to make Rescous, as some Opinions are in 40 E. 3. 33. a. 6 R. 2. Rescous 10. 22 H. 6. 2. b. 6 E. 4. 11. b. 7 E. 4. 20. a. But it was resolved, That if nothing is behind, and the Lord distrains, the Tenant may make (a) Rescous; or if he often distrains so that he can't manure his Land, he may have his Assise de (b) *multiplici districtione* and that in such Case the Tenant may make Rescous as divers Judgments have been given. Vide 2 H. 4. 21. b. 8 H. 4. 1. 4 E. 6. Distress 75. Br. by the Justices. Vide 31 E. 3. Rescous 17. 39 E. 3. 45. 39 H. 6. 7. F. N. B. 102. E. 27 Ass. 51. 28 Ass. 50. *Nota* Reader, a great Doubt in our Books well resolved; But for wrongful Distress where nothing is arreare, the Tenant shall not have an Action of (c) Trespafs *vi & armis* against the Lord, for that is prohibited by the Statute of *Murlebr. cap. 3. non ideo punitur Dominus per redemptionem.* And if Lord and Tenant are by Fealty and 2 s. Rent, and the Lord by Encroachment, s. by voluntary Payment of the Tenant gets Seisin of more than he ought to have, the Law so greatly favours Seisins and Possessions, that he shall not avoid this Seisin had by Encroachment in (d) Avowry, unless it is in the Case of the (e) Successor, as 4 E. 2. Avowry 204. is agreed; and in Case of the Issue (f) in Tail, as is held in 20 E. 3. Avowry 131. But Seisin by Encroachment shall be avoided in Assise, (g) and *Cessavit*. Vide 22 Ass. 68. 22 E. 3. 18. 28 Ass. 33. 12 E. 4. 7. 10 H. 7. 11. 10 H. 6. 3. b. the same Law in Trespafs. Also if he distrains, s. for the due Rent and the Encroachment also, for the whole Rent Arrear the Tenant may tender that which is due of Right, and may make Rescous if the Lord will not accept it, vide 12 E. 4. 7. 5 E. 4. 62. 87. and shall not be driven to *Ne injuste vexes*, or *Contra formam feoffamentis*, as his Case is, but it shall be avoided in an Action brought by the Lord for the Rescous, or in Trespafs brought by himself for the Distress for the Sum which was encroached, and which of Right was not due. But if the Lord encroaches more by (b) Coercion of Distress than he ought to have (altho' the Coercion be to his Goods) yet he shall avoid such Seisin in Avowry, vide 10 E. 3. 26. 22 E. 4. 7. Long 5 E. 4. 87. 20 E. 4. 17. 8 H. 6. 18. 30 H. 6. 5. 10 H. 7. 11. Plov. Com. 94. b. in *Woodland's Case*. 3. It was resolved, That altho' a Man has been out of Posses. of Land for 60 Years yet if his Entry is not toll'd he may well enter, and bring any Action of his own Possession, for the first Clause doth not bar any Right, but prohib. that no Pers. shall sue, have, or maintain any Writ of Right, or make any Prescription, Tit. or Claim, for

(a) 6 Co. 23. a. Co. Lit. 160. b.

(b) 27 Ass. 71. Br. Assise 273. 8 Ass. 50. Br. Assise 290. Br. Distress 34. 8 Co. 50. a. b. 11 Co. 44. a. F. N. B. 108. i.

(c) 2 Inst. 105. 44 E. 3. 20. a. 9 Co. 76. a. 10 E. 4. 7. a. 9 H. 7. 4. a. 14. a. 11 H. 4. 78. b. Co. Lit. 127. a. Fitz. Office del Court 7. Br. Office del Court 29. Plov. 66. b. 84. 85. a.

(d) 9 Co. 34. a. Doct. pla. 318. 5 Co. 100. b.

(e) 2 Inst. 21. 9 Co. 34. a.

(f) Doct. pla. 318. 2 Inst. 21.

(g) 9 Co. 34. a. 10 Co. 108. a. Doct. pla. 318.

(h) 5 Co. 100. b. 9 Co. 34. a.

2 Inst. 21. Doct. pla. 318.

(b) 2 Inst. 21.

for any Lands, Tenements, Rents, Commons, &c. of the Possession of his Ancestor or Predecessor, but only of the Seisin of some of his Ancestors within 60 Years: But if his Entry is congeable, and he enters, he may have an Action of his own Possession; and the first and second Clauses extend only to Seisin *ancestral*, and not to a Writ of *Right* brought of his own Seisin. And the third Branch extends only to Actions of his own Possession, and not to Entries; the fourth to Avowries, and the fifth to Formedon and certain Actions there mentioned. *Nota* Reader, forasmuch as by these Resolutions it appears, that the Services of Homage and Fealty are not within the Act of 32 H. 8. and that Seisin of Rent, or other annual Service is Seisin of Homage and Fealty, and that Seisin of Homage or Fealty is Seisin of all Services annual, or not annual; thence it follows, that when the Tenant has done Homage or Fealty, (which the Lord may compell him to do) it shall be Seisin of all other Services as to make Avowry, which of Right Co. Lit. 62. 2. ought to be done, altho' the Lord nor any by whom he claims have had Seisin within 60 Years.

Trin. 20 ELIZABETHÆ Regina
Rot. 28. *In the King's Bench.*

Actiones de Scandalis, or Actions for Slander.

HENRY Lord Cromwell brought an *Action de Scandalis Magnatum* against Ed. Denny Vicar of Northlinham in the County of Norfolk, *tam pro Dom' Regina, quam pro seipso*; and declared upon the Statute of 2 R. 2. cap. 5. That if any contrive *aliqua falsa nova, horribilia & falsa nuncia de Prelatis, Ducibus, Comitibus, & aliis Proceribus & Magnatibus Regni, &c.* by which Debate may arise betwixt the Lords and Commons (which God forbid) by which Danger, Mischief, and Destruction may happen to the whole Realm, &c. and *quicumque contra fecerit* shall incur the Penalty of the Statute of W. 1. c. 33. And the Defendant was charged that he said to the Plaintiff, (a) then a Baron of the Realm, *It is no Marvel that you like not of me, for you like of those that maintain* (b) *Sedition against the Queen's Proceedings.* The Defendant justified the Words, upon which the Plaintiff demurr'd, and the Bar was held insufficient. And Term' Trin' anno 23. Eliz. in Arrest of Judgment it was moved by the Defendant's Council, that the Declaration was insufficient, because the said Act of 2 R. 2. was (c) misrecited; for the Words of the Act are, *Si ascun controuer ascun faux nouvelles & horribles & faux messoinges,* which Word (d) (*Messoinges*) he who translated the Statutes at large into *English*, has translated (*Messages*) which was the Reason that he, who drew the Declaration in the Case at Bar inserted the said Word (e) (*nuncia*) where it should be *mendacia*. 2. The said Act saith, *and whosoever shall do it shall incur, &c.* And the Plaintiff in his Declaration saith, *& Quicumq; contra fecerit*, which is as much as to say, *who shall not do it*; But against that it was objected, That the said Act was a private Act concerning only the Prelates, Nobles, and

Henry Lord Cromwell
 against Ed. Denny
 in the County of Norfolk,
 in the King's Bench,
 Trin. 20. Eliz. 28.

(a) Cro. Car. 136.

(b) Doct. pla. 203. 21. 3 Bullf. 266. 1 Rol. Rep. 427.

(c) Doct. pla. 93. 340.

(d) Hutt. 56.

(e) Cr. Car. 135. 136. 3 Bullf. 91.

and certain great Officers, whereof the Court wou'd not take Notice *ex officio*; and therefore the Court ought to take the Act, as the Parly has alledged it: But it was resolv'd by *Wray* Chief Justice, Sir *Thomas Gawdy & totam Curiam*, that it was such an Act, whereof the (a) Court ought to take Notice: and *eo magis* because it by a Means concerns the King himself. 1. Forasmuch as it touches the Prelates, Nobles, and great Officers, which are of the King's Council, and of eminent Qualities, and serve him in so high and honourable Offices which they have under the K. and by his Royal Authority have the Administration of Justice to his Subjects, by which it appears that the slandering of them principally concerns the King himself in his Royal Government. 2. Forasmuch as the Statute saith, That Danger, Mischief, and Destruction may happen to the whole Realm, &c. that also concerns the King for he is the Head of the Realm; and these are the Reasons that always such Actions de *Scandalis magnatum* have been brought upon the said Stat. *tam (b) pro Domino Rege quam pro seipso*, and of all Statutes which concern the (c) King, the Judges ought to take Notice. It was likewise resolv'd that if the Act was private, and that the Court ought to take it to be such as is alledged; Then the said Act was against Law, and Reason, and therefore void: For as it is alledged, those who don't offend shall be punished, and that was *condemnare insontem & dimittere reum*; wherefore Judgment was given against the Pl. *quod nihil capiat per billam*. And afterwards the Pl. brought a new Action, and amended the Faults of the Declaration: And then the Court was moved that the said Words were not Actionable, because it might well be that the Pl. meant liking of some Persons which maintain Sedition against the Queen's Proceedings, and yet he did not (d) know that they maintain Sedition, nor do the Words import that the Pl. knew that they maintain'd Sedition. And it was said, *quod sensus verborum est duplex*, scil. *mitis & asper*; & *verba semper accipienda sunt in (e) mitiore sensu*. To which it was said, that Sedition is a publick Thing. *Et dicitur Seditio (f) quasi seorsum itio magni populi, quando ziur ad manus*, which is notably described by the Poet:

Ac veluti magno in populo cum saepe coorta est

Seditio, sevitque animis ignobile vulgus,

Jamq; faces & saxa volant, furor arma ministrat. Virg. *Æn.*

Virgil 1 *Æncid.*
1 Roll. 71, 72.
73. 1 Mod. Rep.
199. 23. Poph.
211. Palm. 29.

(f) Rulhw.
Collect. Append.
19, 20, &c.

By which Sedition (being so publick and violent) it was said that by common Intendment the Plaintiff had Notice of it; and it is not like Felony or Murder which may be clandestine, and done in Secret. But as to that the Judges did not deliver any Opinion, for the said, that upon Argument and Consideration they might alter their Opinion

which they now conceived, which wou'd be dangerous to the Party; and therefore they said to the Defendant's Council, be well advised, and plead, or demur at your Peril, wherefore they pleaded a special Justification, (well knowing that the other Matter wou'd be saved to them) and the Effect of the Justification was, That the Defendant was Vicar of *Northlinham*, which was a Benefice with Cure, and that the Plaintiff procured *J. T.* and *J. G.* to preach severally in the Church of *Northlinham*, who in their Sermons inveigh'd against the Book of Common Prayer, which was established by the Queen and the whole Parliament in the first Year of her Reign, and affirm'd it to be superstitious and impious, &c. upon which the Plaintiff and Defendant speaking in the said Church of these Sermons, because the Vicar knew they had no Licence nor were authorized to preach; when they were ready to preach, before their Sermons forbad them, but they by the Encouragement of the Plaintiff proceeded: The Plaintiff said to the Defendant, *Thou art a false Varlet, and I like not of thee; To which the Vicar said, It is (b) no Marvel though you like not of me, for you like of these innuendo pred' J. T. and J. G. that maintain Sedition, (innuendo seditiosam illam doctrinam) against the Queen's Proceedings; and so justified: And it was moved by the Plaintiff's Council, that this Bar was insufficient for two Reasons. 1. That the Matter of Justification was insufficient, because (as has been said) Sedition can't be committed by Words, but by publick and violent Action. 2. If the Matter of Justification was sufficient, then upon the said Dialogue between the Pl. and Def. the Def. is not guilty: But it was said, that such Justification Dialogue-wise had not been seen before; but if the Truth of the Cause is such, he ought to plead Not Guilty, and give the special Matter in Evidence. But if he will justify, he ought to justify the Words in the same Sense they import upon the Matter alledged in the Declaration. As if a Man brings an Action on the Case for calling the Pl. (c) Murderer; The Def. will say, that he was talking with the Pl. concerning unlawful Hunting, and the Pl. confessed that he killed several Hares with certain Engines; to which the Def. answered and said, *Thou art a Murtherer (innuendo the killing of the said Hares) this is no (d) Justification, for he does not justify the Sense of the Words which the Declaration imports, and therof. he ought to plead not guilty: But as to that it was answered by the Defr's Council, and resolved by the whole Court, That the (e) Justification was good. For in Case of Slander by Words, the Sense of the Words ought to be taken, and the Sense of them appears by the Cause and Occasion of speaking of them: For sensus verber' ex causa dicendi accipiend' est, & sermones semper accipiendi**

(a) Doct. pla. 20, 21.

(b) Doct. pla. 20, 21.

(c) Doct. pla. 21.

(d) Doct. pla. 21. Postea 14. a.

(e) Doct. pla. 20, 21.

piendi sunt secundum subjectam materiam. Then in this Case the Defendant's Council have well done to shew the special Matter by which the Sense of this Word (*Sedition*) appears upon the Coherence of all the Words, that it was in the Defendant's Meaning, the said seditious Doctrine against the Queen's Proceedings, *scil.* the said Act of Parliament *de anno primo*, by which the Book of Common Prayer was established, and that he did not mean any such publick or violent Sedition as has been described, and as *ex vi termini per se* the Word it self imports; And it was said, God forbid that a Man's Words shou'd be by such strict and grammatical Construction taken by Parcels against the manifest Intent of the Party upon Consideration of all the Words, which import the true Cause and Occasion which manifest the true Sense of them; *Quia quae ad unum finem loquuta sunt, non debent ad alium detorqueri:* And therefore in the said Case of Murder, the Court held the (a) Justification good; and that the Defendant shou'd never be put to the general Issue, when he confesses the Words and justifies them, or confesses the Words, and by special Matter shews that they are not actionable. And altho' he varies from the Plaintiff in the Sense and Quality of the Words, yet it is no Cause to drive him to the general Issue: As in Maintenance the Plaintiff charges the Defendant with unlawful Maintenance, the Defendant may justify by Reason of a lawful Maintenance, and may not plead the general Issue: wherefore the Plaintiff replied and said, *Quod praed' Edwardus Denny dixit & propalavit praedicta verba, &c. de injuria sua propria absque tali causa*, and thereupon Issue was joyned; & *postea partes concordaverunt*; And this was the first Cause that the Author of this Book (who was of Council with the Defendant) moved in the King's Bench. In this Case, Reader, you may observe an excellent Point of Learning in Actions for Slander, to observe the Occasion and Cause of speaking of them, and how it may be pleaded in the Defendant's Excuse. 2. When the Matter in Fact will clearly serve for your Client, altho' your Opinion is that the Plaintiff has no Cause of Action, yet take Heed you do not hazard the Matter upon a Demurrer; in which upon the Pleading, and otherwise more perhaps will arise than you thought of; but first take Advantage of the Matters of Fact, and leave Matters in Law, which always arise upon the Matters in Fact *ad ultimum*, and never at first demur in Law, when after Tryal of the Matters in Fact, the Matters in Law (as in this Case it was) will be saved to you.

(a) Doct. pla. 21. Antea 137 b.

Doct. pla. 116.

It

2.

M. 27 & 28 El.
in B. R. Cutler
& Dixon.

(2) 3 Leon. 123.
4 Leon. 35. Noy
102. 1 Bullfr.

151, 185. Cro.
El. 230, 231,
248. Cro. Jac.

134, 191, 356,
432. Godb. 240,
340. 2 Bullfr.

269. 1 Rol. Rcp.
61. Palm. 145,
188, 189. 1 Sand.

132. 2 Sid. 163.
1 Vent. 25. Mo.
143, 820, 821.

2 Inst. 228. Yelv.
117. March. 76,
77.

3.

M. 33 & 34 El.
Buckley & Wood.
in B. R.

(b) Cro. El. 230,
247, 248. 2 And.
28. Moor 705,

706. 2 Brownl.
100. Hard. 223.
Lanc 50.

(c) Cr. El. 230.
Doch. pla. 21, 55.

(d) March 76,
77. Yelv. 117.

2 Inst. 228. Noy
102. Cr. El. 230,
231, 248. Cr.

Jac. 134, 191,
356, 412. 3 Leon.
123. 4 Leon. 35.

1 Bullfr. 151,
185. 3 Bullfr.
269. Godb. 240,

340. 1 Rol. Rcp.
61. Palm 145,
188, 189. 1 Sand.

132. 2 Sid. 163.
1 Vent. 25. Moor
143, 820, 821.

(e) Dyer 285. pl.
37. Kelw. 36, 37.
38. Cro. El. 230.

(f) Hob. 267.
1 Hob. 206. 2 Inst.

It was adjudg'd, that if one exhibits Articles to Justices of Peace against a certain Person, containing divers great Abuses and Misdemeanors, not only concerning the Petitioners themselves, but many others, and all this to the Intent that he shou'd be bound to his good Behaviour: In this Case the Party accused shall not have for any Matter contained in such Articles any Action upon the Case, for they have pursued the (a) ordinary Course of Justice in such Case: And if Actions shou'd be permitted in such Cases, those who have just Cause of Complaint, wou'd not dare to complain for Fear of infinite Vexation.

The Case was, that *Owen Wood* exhibited a Bill in the *Star-Chamber* against Sir R. (b) *Buckley*, and charged him with divers Matters examinable in the same Court; and further, that he was a Maintainer of Pyrates and Murderers, and a Procurer of Murders and Piracies, which Offences were not determinable in the *Star-Chamber*: Sir R. *Buckley* brought an Action on the Case against *Owen Wood*, and declared that the said *Owen* had exhibited the said Bill, containing (*inter alia*) that the said *Rich.* was a Maintainer of Pirates and Murderers, and a Procurer of Murders and Piracies, and that the said *Owen* at *B.* in the County of *Salop*, speaking of the Matters contained in the said Bill, said *in auditu quamplurimorum* That the said Bill and Matters therein contained were true: The Defendant confessed the exhibiting of the Bill in the *Star-Chamber*, and that he in the said Court at *Westm*' said the said Words; *absque hoc* that he spoke the Words in the County of *Salop*, before or after the Day mentioned in the Declaration, by which he excluded the (c) Day it self and answered not to it, for which Cause the Bar was held insufficient *per totam Curiam*. And it was resolved *per totam Curiam*, That for any Matter contain'd in the Bill that was examinable in the said Court, no Action lies, altho' the Matter is meerly false, because it was in (d) Course of Justice: And this agrees with the Opinion in 11 *Eliz. Dyer* 285. and with the Judgment in *Cutler* and *Dixon's* Case before. 2. It was resolv'd and adjudg'd, that for the said Words not (f) examinable in the said Court, an Action on the Case lies, for that can't be in a Course of Justice; for the Court has no Power or Jurisdiction to do that which appertains to Justice, nor to punish the said Offences, and if such Matters may be inserted in Bills exhibited in so high and honourable a Court, in great Slander of the Parties, and they cannot answer it

Cr. El. 248, 836. Cro. Jac. 134, 432. 2 And. 28, 29. 2 Brownl. 100. 1 Rol. 34.
1 Hob. 206. 2 Inst. 228. Moor 143, 706. 1 Vent. 25.

to clear themf. nor have their Action as well to clear themf. of the Crimes, as to recover Damages for the great Injury and Wrong done them, great Inconvenience will enfue; but the faid Libel without any Remedy given the Party will ever remain always on Record, to his Shame and Infamy which will be full of great Inconvenience. Also by the Law no Murder, or Piracy can be tried on any Bill exhibited in English, but the Offender ought to be indicted for it, and thereupon to have his Tryal; and therefore he who preferr'd this Bill has not only mistaken the proper Court, but the Manner and Nature of exhibiting the faid Bill (as to the faid Claufes) has not any Appearance of an ordinary Suit in Courfe of Justice: But if a Man brings an Appeal of Murder, returnable in *C. B.* for that no Action lies; for altho' the Writ is not returnable before competent Judges who can do Justice, yet it is in the Nature of a lawful Suit, namely by Writ of Appeal. And afterwards Judgment was given for the Plaintiff. And fo in the like Cafe, *Tr' 21 Eliz. Rot. 561. inter Bowes (a) & Standen*,^{(1) Cro. El. 231. 248. 2 And. 29.} it was resolv'd *per totam Curiam* in *B. R.* in the like Cafe on a Bill preferr'd in the Star-Chamber; but the Parties agreed and no Judgment was entred. And upon the fame Judgment *O. Wood* brought a Writ of Error in the Exchequer-Chamber; and there it was resolv'd that upon the faid Matter *Sir R. Buckley* might have had a good Action: But in this Cafe, he has not alledged the Matter in a fufficient Manner, for the Action was not grounded upon the Bill exhibited at *Westminster*, but becaufe he faid in the County of *Salop in auditu quamplurimorum*, that his Bill was true without expreffing the faid Matters in particular contain'd in the Bill on which the Action was intended to be grounded, fo that they who heard only the faid Words, That his Bill was true, cou'd not without faying more, know the faid Claufes that were slanderous to the Plaintiff; and for this Caufe the Judgment was revers'd.^{Co. Ent. 2; nu. 21.}

The Plaintiff reciting in his Declaration, that whereas he was a Justice of Peace, Surveyor of the Dutchy of *Lancaster*, and had divers other Offices; The Defendant faid of him, *M. Stanhop hath but one Manor, and that he hath gotten by swearing and forswearing*: And it was adjudged that the faid Words were not actionable. 1. Becaufe they were too general; and Words which fhall charge any one with an Action, in which Damages fhall be recover'd, ought to have convenient Certainty. 2. The Defendant doth not charge the Plaintiff with swearing or forswearing, for he may

4.
P. 27 El. Stanhop
blich. in B. R.
Co. Ent. 21. nu.
18. Cro. El. 1, 2,
603. 888.
Winch. 124.
3 Leon. 163.

may recover or get a Manor by swearing and forswearing, and yet he was not procuring or assenting to it: and Words which maintain an Action ought to be directly applied to the Plaintiff, and not by Collection or Inference; for the Damages ought to be given to the Plaintiff, in Regard to the Damage which he has by the Scandal. 3. If one charges another that he has (a) forsworn himself, it is not actionable for two Reasons. 1. Because he may be forsworn in common Conversation, *Quia benignior sententia in verbis generalibus seu dubiis est preferenda*. 2. It is an usual Word of Passion and Anger for one to say, that another has forsworn himself; As if one says of another, that he is a Villain, or a Rogue, or a Varlet, *vel similia*, these or such like will not maintain an Action, for (b) *boni Judicis est lites dirimere*: But if one says of another, that he is (c) perjur'd, or that he has forsworn himself in such a Court, for such Words an Action shall be maintained; for by these Words it appears that he has forsworn himself in a Judicial Proceeding; *Sed hac ita in promptu sunt, ut res probatione non egent*. For all these Cases have been often adjudg'd. And Wray Chief Justice said, That altho' Slanders and false Imputations are to be suppressed, because many Times a (d) *verbis ad verbera perventum est*: yet he said, That the Judges had resolv'd, that Actions for Scandals shou'd not be maintain'd by any strained Construction or Argument, nor any Favour given to support them, for as much as in these Days they more abound than in Times past, and the Intemperance and Malice of Men increase; *Et malitiis hominum est obviandum*: And in our Books *Actiones pro Scandalis sunt rarissima*; and such which are brought, are for Words of eminent Slanders, and of great Import.

(c) 1 Rol. 39,
40, 41, 42.
Godb. 340.
Yelv. 27. Cro.
El. 135, 293,
394, 492, 905.
Poph. 211. Noy
34. 1 Bull. 40.
3 Inst. 166. Hutt.
34, 44. Hob.
283. 1 Brownl,
13. Moor 365,
404. Cro. Jac.
100, 204, 436.
Cro. Car. 288,
337, 378.
Winch. 2 & 3.
1 Leon. 127.
1 Jones 307.
10 H. 8. Br.
Action sur le
Case 104.
(d) 5 Co. 31. a.
73. a.
(e) Hutton 34,
44. Cro. El. 135.
Cro. Jac. 120.
158, 80, 436.
Moor 365. Yelv.
27, 72. 3 Inst.
166. 1 Rol. 39,
40, 42.
(d) Palm. 129.

5.

Yeomans charged Hext then being a J. of Peace; *For my Ground in Allerton, Hext seeks my Life, and if I could find John Silver, I do not doubt but within two Days to arrest Hext for Suspicion of Felony*: And it was adjudged, that for the first part of the Words, *That for my Ground in Allerton Hext seeks my Life*, no Action lay for two Reasons. 1. Because he may seek his Life lawfully upon just Cause, and his Land may be held of him, and so in (a) *mitiore sensu*. 2. Seeking of his Life is too general, and for seeking *tantum* no Punishment is inflicted by the Law: But for the (b) latter Words it was adjudged, that the Action lay, because for Suspicion of Felony he shall be imprisoned, and his Life drawn in Question.

Eodem Term
Hext v. Yeomans
in B. R. Poph.
210. Iatch. 176.
3 Bull. 262.
Godb. 340.

(a) 4 Co. 13. a.
20. a. Godb. 278.
Postea 17. b.
Poph. 211.
1 Roll. 71, 72,
73. 1 Mod. Rep.
19, 23. Hutt. 38,
65, 113.
(b) Poph. 210.
Larch. 176.
3 Bull. 262.
Godb. 340.

Byrchley being one of the Attorneys or Clerks of B. R. and sworn to deal duly without Corruption in his Office: the Defendant speaking of the Manner of *Byrchley's* dealing in his Profession, said to *Byrchley*, *You are well known to be a corrupt Man, and to deal corruptly.* 1. It was resolv'd that the said Words *ex causa dicendi* imply that *Byrchley* had dealt corruptly in his Profession: Also it was said, *Quod sermo relatus ad Personam, intelligi debet de (b) conditione personæ.* And the Plaintiff had Judgment for two Reasons. 1. Because the said Scandal touches the Plaintiff in his said Oath. 2. The said Words scandalize him in the Duty of his Profession, by which he gets his Living. *Skinner* a Merchant of London said of *Manwood* Chief Baron, *That he was a (c) corrupt Judge;* and it was adjudg'd that the Words were actionable, *Vide 4. E. 6. Action sur le Case* 112. But it was resolv'd in the principal Case, That if the precedent Speech had been, that *Byrchley* was an Usurer, or that he was another's Executor, and would not perform the Will, &c. and thereupon the Defendant had spoke the said Words, then no Action would be maintainable for them, which agrees with the Resolution in the Lord *Cromwel's* Case.

Stuckley (*d*) Justice of Peace in the County of Devon, brought an Action on the Case against *Bulhead* for these Words; *M. Stuckley covereth and hideth Felonies, and is not worthy to be a Justice of Peace;* And adjudg'd, that the Action lies, for it is against his Oath and the Office of a Justice of Peace, and a good Cause to put him out of the Commission, and he may be indicted and fined for it.

The Defendant said, That the Plaintiff was (*e*) detected for Perjury in the *Star-Chamber*; and adjudged, that no Action lay: For an honest Man may be detected, but not convicted; and every one who has a Bill of Perjury exhibited against him there, is detected.

The Plaintiff shewed in his Declaration, That the Defendant had a Wife yet living, and that the Defendant said of the Plaintiff, *Thou hast killed my (f) Wife, thou art a Traitor.* And as to these Words, *Thou hast killed my Wife*, the Defendant demur'd in Law; and it was adjudged, that no Action lay; and the Difference taken when the Wife was living (as in this Case it appeared the was) and when she was dead; For when she is alive no Action lies, altho' the Defendant says, That the Plaintiff has murdered her; for then it appears that no Murder of her can be committed, nor the Defendant in any Jeopardy, and so the Words vain, and no Scandal or Damage to the Plaintiff.

The

Actiões de Scandalis, or PART IV.

IO.
Tr. 40 El. In
C. B. Eaton v.
Allen.
(a) Cr. Car.
140. Cr. Eliz.
684.
(b) Cr. El. 49.
Moor 419.
2 Bullst. 206.
3 Bullst. 167.
Lanc 98.
(c) Cr. Eliz.
191. 3 Bullst.
167.

(d) Moor 142.
1 Leon. 187.
2 Siderf. 22, 31.
1 Anderf. 121.

(e) Postca 19. b.
Cr. Car. 140.
1 Jones 195.
1 Siderf. 231.

The Defendant said of the Plaintiff, *He is (a) a Brabler and a Quarreller, for he gave his Champion Counsel to make a Deed of Gift of his Goods to kill me, and then to fly out of the Country, but God preserved me.* And it was strongly urged that the Action should be maintainable, and divers Cases cited; one of the Lady (b) Cockeyn, M. 32 & 33 El. in R. R. for these Words, *My Lady Cockeyn offered to give Poyson to one to kill the Child in her Body.* Another inter Tibots & Heyn in Gloucester for these Words, (c) *Tibots and another did agree to hire one to kill S.B.* Also Cardinal's Case for these Words, *If I had consented to M. Cardinal, T.H. had not been alive:* And the Lord Lumley's Case; *My Lord Lumley (d) hath gone about to take away my Life against all Christian Dealing.* But upon great Consideration and Advise ment it was adjudg'd that in the principal Case the Words were not actionable: for the Purpose or (e) Intent of a Man without Act is not punishable by Law. *Et ubi non est Lex, ibi non est transgressio quoad mundum.* And altho' for such Conspiracy he might be punish'd in the Star-Chamber, that is by the absolute Power of the Court, and not by the ordinary Course of the Law. *Nota bene,* this Case, and the Cause and Reason of this Judgment.

II.
Tr. 35 El. Davis
v. Gardiner
Popn. 36.
1 Rolls Rep. 34.
35, 119. Moor
409. Cr. Car.
141. 155. Cr.
Jac. 323. 2 Bullst.
89, 90. 1 Siderf.
397. 1 Jones 141.
2 Siderf. 172.
Larch. 218.
2 Rolls Rep.
249. Poph. 140.
Hecl. 161.

Cr. Jac. 323. Cr.
Eliz. 639.
1 Vent. 4.

The Plaintiff declared, That she was a Virgin of good Fame, &c. and free from all Suspition of Incontinency, &c. And whereas *Anthony Elcock* Citizen and Mercer of London, of the Substance and Value of 3000 l. desired her for his Wife, and had thereupon conferr'd with *John Davis* her Father, and was ready to conclude it, the Defendant (*præmissarum non ignarus*) to defame the said *Ann*, and to obstruct the said *Anthony's* Proceeding, uttered and published of the said *Ann* these Words; *I know Davis's Daughter well* (innuendo præd' Annam) *she dwelt in Cheapside, and there was a Grocer that did get her with Child* (and the Defendant being there then admonished that he should be advised *quid dixerat de præfata Anna:*) *ulterius de eadem dixit: I know very well what I say, I know her Father, and Mother, and Sister, and she is the youngest Sister, and had the Child by the Grocer:* By Reason of which Words the Pl. was greatly defamed, & *ratione inde dict' Antonius ipsam Annam in uxore ducere penitus recusabat;* and the Defendant pleaded not guilty, and by *Nisi prius* in the County of Buck. the Jurors found for the Plaintiff, and assessed Damages to 200 Marks. And it was now moved in Arrest of Judgment by the Defendant's Council, that the said Defamation of Incontinency concern'd the Spiritual, and not the Temporal Jurisdiction: And therefore as the Offence shou'd be punished in the Spiritual Court, so her Remedy for such Defamation shou'd be there also; for *Cognitio causa non spectat ad Forum Regium:* So it a

Man is called *Bastard*, or *Heretick*, or *Miscreant*, or *Adulterer*, (for as much as these belong to the (a) Ecclesiastical Jurisdiction) no Action lies at the Common Law; and in Proof thereof 12 H. 7. 22. a. b. & 27 H. 8. 14. a. b. were cited. But it was answer'd by the Plaintiff's Council, and resolv'd *per totam Curiam*, that the Action was (b) maintainable for 2 Reasons. 1. Because if the Woman had a Bastard, she was *punishable by the Statute of 18 Eliz. cap. 3. And altho' Fornication or Adultery is not examinable by our Law, because they are done in secret, and peradventure are indecent to be openly examin'd, yet the having of a Bastard is a Thing apparent and punishable by the said Act. 2. It was resolv'd, if the Defendant had charged the Plaintiff with bare Incontinency, yet the Action should be maintainable: For in this Case the Ground of the Action is (c) Temporal, *s.* that she was to be advanced in Marriage, and that she was defeated of it, and the Means by which she was defeated was the said Slander, which Means tending to such End shall be try'd by the Common Law. So if a Divine is to be presented to a Benefice, and one to defeat him of it, says to the Patron, *That he is an Heretick, or a Bastard, or that he is Excommunicated*, by which the Patron refuses to present him (as he well might if the Imputations were true) and he loses his Preferment, he shall have his Action on the Case for these Slanders tending to such End. And if a Woman is bound that she shall live continent and chaste; or if a Lease is made to her *quamdiu (d) casta vixerit*, in these Cases Incontinency shall be tried by the Common Law. And *Popham* Chief Justice said, That if one says of a Woman that keeps an (e) Inn, that she has a great infectious Disease, by which she loses her Guests, she shall have an Action on the Case. *Trin. 25 Eliz. in B. R. inter Banister & Banister*, it was resolv'd, That where the Defendant said of the Plaintiff (being Son and Heir to his Father) that he was a (f) Bastard, that an Action on the Case lies; for it tends to his Disinheritance of the Land which descends to him from his Father: But there it was resolv'd, That if the Defendant pretends that the Plaintiff was a Bastard, and that he (g) himself was the next Heir, there no Action lies, and that the Defendant may shew by Way of Bar, if the Plaintiff omits it in his Declaration; which agrees with the Resolution in *Ann Davis's Case*, and with the Lord *Cromwel's Case*.

The Plaintiff declared, That the Defendant and one *John Bonner* having Conference of the Plaintiff, the Defendant said of the Plaintiff to the said *John Bonner* these Words, *Hang him (prædictum Johannem James innuendo) he is full of the Pox (innuendo) the French (a) Pox, I marvel that you (præd' Johannem Bonner innuendo) will eat*

D.

(a) 1 Brownl. 16. Moor 10, 29. Cr. Eliz. 787. Godb. 327, 328.
 (b) Cr. Eliz. 639, 787.
 (c) Cr. Eliz. 55. Palm. 298.
 (d) Cr. Car. 147. 155. Cr. Jac. 323, 642. Palm. 298. 1 Rolls 35. Cart. 234, 235. 3 Keb. 148. 5 Co. 58. a. Metl. 161.
 (e) 2 Rolls Rep. 136. Cr. El. 289. 582, 583.
 (f) 1 Rolls Rep. 244. 2 Rolls Rep. 250. Cr. Jac. 422. Cr. Car. 469. 1 Jones 388. Hob. 179. Godb. 451. Owen 32. Dall. 63. 3 Bullst. 75. 1 Rolls 38. Cr. El. 346, 347.
 (g) Postea 18. a. 1 Siderf. 79. Cr. Jac. 164. Moor 188. Cr. El. 197.
 12. M. 41 & 42. El. in B. R. James v. Rutlech. Mo. 1573. 1 Rolls 67. Stiles 206. (a) Cr. El. 289. Cr. Jac. 430. Cr. Palm. 64, 65.

Actiones de Scandalis, or PART IV.

or drink with him, (prædictum Johannem James innuendo) I will prove that he is full of the Pox (innuendo) the French Pox. The Defendant pleaded, not guilty, and it was found for the Plaintiff, and Damages assessed. And it was mov'd in Arrest of Judgment, that the Words were not actionable: And it was resolv'd, that in every Action on the Case for slanderous Words, two Things are requisite.

(a) Moor 63.

1. That the Person who is scandalized, is (a) certain. 2. That the Scandal is apparent by the Words themselves; and therefore if one says without any precedent Communication, that one of the Servants of J. S. (he having many) is a notorious Felon, or Traytor, &c. here for the Incertainty of the Person no Action lies; and an (b) *innuendo*

(b) 1 Siderf. 52.
March. 109, 110.
2 Rolls Rep. 145.
Cr. Car. 256,
243, 443.
3 Bulst. 72, 83.
1 Rolls Rep. 227.
Hurr. 65. Cr.
Jac. 241, 126,
107, 514. Cr.
El. 497. Hob. 2,
3, 43, 268. Aleyn
32. Styles 46.
Yelv. 21. Hurr.
65. 1 Rolls 82,
83, 84. Herl.
174.

can't make it certain. So if one says generally, *I know one near about J. S. that is a notorious Thief, or such like;* But when the Person is once named in certain, as if two speaking together of J. S. one says *He is a notorious Thief,* there J. S. in his Declaration may shew that there was Speech of him between them two, and that one said of him, *He (innuendo prædict J. S.) is a notorious Thief.* For the Office of an *innuendo* is to contain and design the same Person who was named in certain before, and in Effect stands in lieu of a *prædict*, but an *innuendo* can't make a Person certain who was uncertain before. For it wou'd be inconvenient, that Actions shou'd be maintained by Imagination of an Intent which doth not appear by the Words upon which the Action is grounded, but is altogether uncertain and subject to deceivable Conjecture:

(c) 10 Co. 130. b.

But if one says to J. S. *Thou art a (c) Traytor, &c.* there *constat de persona,* and the Action lies: So here in the Case at Bar, when the Defendant and Bonner had Speech of the Plaintiff, Then, when the Defendant said, *Hang him,* there *innuendo* will denote the same Person named before: But if the Defendant without any Discourse of the Plaintiff had said, *Hang him, &c.* there no *innuendo* wou'd have made the Person certain. As to 2. as an *innuendo* can't make the Person certain which was uncertain before, so an *innuendo* can't alter the Matter or Sense of the Words themselves: And therefore when the Defendant in the Case at Bar said of the Plaintiff, *That he was full of the Pox,*

(d) Antea 13. a.
13. b. 4 Co. 20. a.
Godb. 278. Poph.
211. Hurr. 38. 65.
113. 1 Rolls 71,
72, 73. 1 Mod.
Rep. 19, 23.
Litch. 2 Palm.
29. 3 Bulst. 74.

(innuendo) *the French Pox,* this *innuendo* doth not do its proper Office, for it endeavours to extend the general Words, *the Pox,* to the *French Pox,* by Imagination of an Intent which is not apparent by any precedent Words, to which the *innuendo* shou'd refer. And the Words themselves shall be taken in (d) *mitiori sensu.*

The

The Plaintiffs brought an Action in London, because the Defendant called the Plaintiff's Wife (a) *Whore*; and the Defendant removed it into *B. R.* by *Habeas Corpus*, and it was moved to have a *Procedendo* to remand it, because the Action was maintainable in London for the said Words, but not at the Common Law. And the *Procedendo* was denied *per tot' Cur'*. For such Custom to maintain Actions for such brabbling Words is against Law; *Licet (b) consuetudo sit magna Auctoritatis, nunquam tamen prejudicat manifeste veritati.*

The Plaintiff declared that he was seised of the Manor and Castle of *H.* in the County of *Strafford* in Fee by Purchase from *George Lord Audley*; and that he was in (a) Communication to demise the said Castle and Manor to *Ralph Egerton* for 22 Years for 200 *l.* Fine, and 100 *l.* Rent *per annum*; and that the Defendant (*promissorum non in nara*) said, *I have a Lease of the Manor and Castle of H. for 90 Years*, and then and there shewed and published a Demise supposed to be made by *George Lord Audley*, Grandfather to the said *George Lord Audley*, for ninety Years to *Edward Dickenson* her Husband, and published the said Demise as a true and good Lease; and so affirmed it, and offered to sell it; *ubi revera* the said Lease was counterfeited by her Husband, and that the Defendant knew it to be counterfeited; by Reason of which Words and Publication, the said *Ralph Egerton* did not proceed to accept the said Lease, to Damage, &c. The Defendant pleaded in Bar, *quod (b) talis Indentura (qualis in the Declaration is alledged) came to the Defendant's Hands by Trover*, and traversed that she knew of the Forgery, upon which the Plaintiff demurr'd in Law. And in this Case three Points were resolved. 1. If the Defendant had affirmed and published, that the Plaintiff had no Right to the Castle and Manor of *H.* but that she her self had Right to them, in that Case, because the Defendant her self (c) pretends Right to them, altho' in Truth she had none, yet no Action lies. For if an Action should lie when the Defendant her self claims an Interest, how can any make Claim or Title to any Land, or begin any Suit, or seek Advice and Counsel, but he should be subject to an Action, which would be inconvenient. Which Resolution agrees with the Opinion in (d) *Banister's Case* before, (e) 2 *E. 4. 5. a. b. & (f) 15 E. 4. 32. a. b.* no Action on the Case lies against one who publishes another to be his (g) Villain, without saying that he lies in wait to imprison him; *Et tales & tantas minas in ipsum fecit, quod circa negotia sua palam intendere non audebat. Vide 22 E. 3. 1. in (h) Conspiracy, 38 E. 3.*

13.

Tr. 41. El. Ox-ford. & Ux. v. Crofs.

(a) 1 Rolls 550. 2 Rolls 69. March. 107. Cr.

Car. 141, 350, 394, 486, 487.

Cr. Eliz. 282, 283. Lit. Rep. 10. (b) Stiles 69, 70, 229, 245. 6 Co. 6. b.

14.

M. 32 & 33 El. Sir G. Gerard Knt. Master of the Rolls v. Dickenson.

(a) Yelverton 89. Cr. Car. 140, 141. Cr. Jac.

307, 308, 485. 1. Rolls Rep. 244. Bulstr. 75.

Palm. 529. Cr. El. 196.

(b) Postea 18. b. Cr. Eliz. 196, 197. Lanc 62.

(c) 1 Rolls Rep. 409. 1 Siderf. 79. Cr. Jac. 164.

Moor 188. Cr. El. 197. Antea 17. a. Hob. 205.

Hcl. 161, 162. (d) Supra 17. a.

(e) Fitz. Action sur le Cafe 16. Br. Action sur le Cafe 90.

(f) Br. Action sur le Cafe 63. Br. Villenage 75.

(g) Cr. Eliz. 197. Kelw. 16. b. 40. a.

(h) Cr. El. 197.

33. 43 E. 3. 20. F. N. B. 116. b. And therefore it was resolved, that for the said Words, *I have a Lease of the Manor of H. for 90 Years*, altho' it is false, yet no Action lies for flandering of his Title or Interest in the said Castle and Manor. And altho' it appears by the Defendant's Bar that she has no Title or Interest in the said Lease, but is a Stranger to it; yet for as much as the Matter alledged in the Declaration doth not maintain the Action, the (a) Bar will not make it good. 2. It was resolved, that there was other Matter in the Declaration sufficient to maintain the Action, and that was because it is alledged in the Declaration that the Defendant knew of the Communication of the making of the said Lease to *Ralph Egerton*, and also that she knew that the Lease was forged and counterfeited, and yet (against her own Knowledge) she has affirmed and published, that it was a good and true Lease, by which the Plaintiff was defeated of his Bargain. *Vide* 5 E. 4. 126. If a Man (b) forges a Bond in my Name, and puts it in Suit against me, by which I am vexed and damaged, I shall have an Action on the Case, 42 Aff. 8. B. offered 8 Oxen to sell to A. as his (c) proper Goods, knowing them to be the proper Goods of P. A. trusting in the Fidelity of B. bought them for 8*l.* and afterwards P. retook the Oxen; in that Case A. shall have an Action upon the Case against B. 3. It was resolved, that the Bar was insufficient, for the Defendant's knowing of the Forgery is not traversable. As in an Action upon the Case, because the Defendant's Dog has bit the Plaintiff's Cattel, *ipse sciens canem suum ad mordendas oves consuetum*; the (d) (*sciens*) is not traversable, but ought to be proved in Evidence upon the general Issue, for *sciens, &c.* is no direct Allegation, nor ever alledged in any Place, so that it is not traversable nor triable. Also the Manner of Pleading, (e) *talis Indentura qualis* in the Declaration is alledged, is no direct Answer to the Indenture alledged in the Declaration, for *talis Indentura non est eadem Indentura*; for *Nullum simile est idem. Vide* 30 Aff. 19. 2 E. 4. 5. 15 E. 4. 32. 27 H. 8. 14. 22. 30 H. 8. Br. *Action sur le Case* 104. 4 E. 6. *ibid.* 112. 28 H. 8. Dyer 19. 6 E. 6. *ibid.* 72. & 75. 3 Mar. *ibid.* 118. 7 Eliz. *ibid.* 236. 11 Eliz. 285. 15 El. 317. And these are in Effect all the Cases in our Books.

(a) Doct. pla. 69.

(b) Hob. 267.
Cr. Eliz. 197.

(c) Cr. Jac. 197,
468, 469, 474
Cr. Eliz. 44

(d) Cr. Jac. 398,
469. 1 Rolls 4
Cr. Car. 254,
487. 3 Bullit. 76.
28 H. 6. 7. a.
Br. travers per-
fans cco 20. Doct.
pla. 189. Hard. 2.
1 Siderf. 21.
2 Bullit. 291.
1 Rolls Rep. 43,
70, 119.
(e) Cr. Eliz.
196, 197. Doct.
pla. 56. Lanc 62.

15.

M. 44 & 45 El.
in B. R. Brit-
tridges Case.
Yelverton 10,
34. 2 Rolls Rep.
341. Moor 666.

Brittridge brought an Action upon the Case for these Words, *Mr. Brittridge is a perjured old Knave, and that is to be proved by a Stake parting the Land of H. Martin and Mr. Wright.* The Def. pleaded not guilty, and was found guilty;

guilty: And now in Arrest of Judgment it was moved, that these Words are not (a) Actionable. 1. Because this Word, *(a) Cr. Jac. 82. Palm. 11.* *A perjured old Knave*, the Noun is *Knave*, and *perjured* is spoke adjectively; As if a Man says, one is a seditious or thievish Knave, these Words are not actionable, because the Words do not import that he hath made Sedition or Felony, but are adjective, which imply an Inclination to it. 2. That the Court ought to judge upon all the Words together, and collect the Defendant's Intention upon all his Words, and not to take his Words by Parcels. And it was said that (b) the last Words extenuate the genuine and proper Sense of the first Words, for Perjury shall be intended in some Court upon Judicial Proceeding; but when he adds, *And that is to be proved by a Stake parting, &c.* (b) *Stiles 379.* that explains for any Thing that appears to the Court, that this Perjury was not in any Court, but an unadvised Oath extrajudicial about the placing of a Stake for a Partition. As to the first, it was resolved by *Popham* Chief Justice, *Gawdy*, *Fenner*, and *Telverton* Justices, that for these Words, *Thou art a perjured Knave*, without any more, an Action upon the Case lies, for sometimes adjective Words will maintain an Action, and sometimes not. They are actionable, 1. When the Adjective presumes an Act committed. 2. When they scandalize one in his Office, or Function, or Trade, by which he gets his Living; As if a Man says, That one is *a perjured Knave*, there must be an Act done, or otherwise he can't be perjured, as was resolved before: So if one says of an Officer, or a Judge, That he is a (c) corrupt Officer or Judge, an Action lies (c) *Supra 26. 2. 1 Vent. 50. Poph. 177. Mod. Rep. 23. 2 Rolls Rep. 136. Pasch. 24 Eliz. inter Philips & Badby in B. R.* for both Causes; 1. Because it implies an Act done: 2. It is slanderous to him in Respect of his Office. *Pasch. 24 El. in B. R. Philips* Batchelor of Divinity and Parson of *D.* brought an Action upon the Case against *Robert Badby Esq;* because the same Defendant spoke these Words in *London*, *Thou hast made a seditious Sermon, and moved the People to Sedition this Day.* The Defendant justified at *St. Edmond's Bury* in *Suffolk*, that he spake the said Words at *Bury*, upon which the Plaintiff demurred; and in that Case two Points were resolved. 1. Notwithstanding that the first Part of the Words were utter'd adjectively, and the latter Words were but moving to Sedition, and it did not appear that any follow'd, yet because they scandaliz'd the Pl. in his Function, it was resolv'd that the Words were Actionable. 2. That the Def. ought to have justified the Words in *London*, and not at *Bury*, for the Words in the Declaration were not answered: wherefore Judgm. was given for the Pl. So if one says of a Merchant, That he is a *Bankruptly Knave*, or *Bankrupt Knave* altho' there (d) *Bankrupt* be spoken (d) *Cro. Jac. 345, 585. 1 Rolls 17. Cr. Car. 31. 472. 1 Rolls Rep. 22. 2 Bullstr. 210. Palm. 10, 11. Godb. 151. Cr. El. 268, 916.* adjectively;

Actiones de Scandalis, or PART IV.

adjectively, yet an Action lies, as it was adjudged in *Milton's Case* in C. B. *Mich. 43 & 44 Eliz.* Or if one says of a Merchant, *That he (a) will be Bankrupt in two Days*, which implies but Inclination, yet an Action lies, 6 E. 6. *Dyer 72.* for that defames him in his Trade by which he gets his Living: But when the Words do not imply an Act done, but an Inclination to an Act which doth not scandalize the Party in the Duty of any Office, or Function nor in his Trade of living, there an Action upon the Case doth not lie; as to say that he is a *seditions* or *(b) thievish Knave*, these do not import an Act to be done, but an *(c) Intent or Inclination* to it, which is not punishable by the Common Law. As to the second it was resolved *in the Case of Brittridge*, That upon all the Words taken together no Action lay; for the latter Words extenuate the first, and explain his Intent, that he did not intend any Judicial Perjury. Also it's impossible that a *Stake* can prove him perjured: And therefore upon Consideration of all the Words for the Impossibility and Insensibility of them they are not actionable, as it has been adjudged, that where one says to another, *Thou art a Thief, for thou hast stolen my Apples out of my Orchard*; or, *For thou hast robbed my Flop-ground*, which latter Words prove it no Felony, and so qualify the proper Sense of this Word *Thief*, which of it self, altho' it is generally spoken, will bear an Action. And so it was adjudged *inter Dobbins & Franklin, Mich. 43 & 44 Elix. in C. B.* And it was agreed that it is all one to say *Thou art a Thief, for thou hast stolen my Apples out of my Orchard*; and to say, *Thou art a Thief, and that will be proved by stealing my Apples in my Orchard.* So in the Case at Bar, *Thou art a perjured old Knave, and that will be proved by a Stake parting, &c.* For the Office of Judges is upon Consideration of all the Words to collect the true Scope and Intention of him who speaks them: And if in this Case the Plaintiff had declared only upon the first Words, *s. Thou art a perjured Knave*, the Defendant might have shewed all the Words, and the Coherence of them, as appears before in the *Lord Cromwel's Case*. But it was said, that if the Plaintiff's Council had disclosed the Truth of the Case in the Declaration, the said Words would have well maintained the Action; for the Truth of the Case was, That in an Action between *Martin & Wright*, the State of the Controversy was, Whether the said *Stake* stood upon the Land of the one, or of the other, or indifferently, as a Boundary betwixt them. And in that Action the Plaintiff was sworn as a Witness, and by the Presence of the Defendant had in his Deposition perjured himself: But this special Matter was not shewed, and therefore it was adjudged, *quod Querens nihil capiat per Billam.*

(a) 2 Rolls Rep. 145, 433.

(b) Latch. 47.
 1 Siderf. 373.
 Palm. 11. Cr.
 Jac. 65, 66.
 (c) Antea 16. b.
 Cr. Car. 140.
 1 Jones 195.
 1 Siderf. 231.
 Yelverton 90.

Godb. 241. Cr.
 Jac. 39. Hurr.
 113. Cr. Jac.
 674 3 Inst. 109.

Barbans

Barham brought (a) an Action on the Case against Netherfal, and the Words were, *Master Barham did burn my Barn* (in-
nueudo a Barn with Corn) with his own Hands and none but
 he; and after Verdict, it was mov'd in Arrest of Judgment,
 That the Words were not actionable, for it is not Felony
 (b) to burn a Barn if it is not Parcel of a Mansion-House,
 nor full of Corn: And in such Case *agitur civiliter* and not
criminaliter, & *verba accipienda sunt in (c) mitiore sensu*: And
 the (d) *Innuendo* will not serve when the Words themselves
 are not slanderous; which well agrees with divers of the Re-
 solutions before.

Touching Defamations determinable in the *Ecclesiastical*
Court, it was resolv'd, That such Defamation ought to have
 three Incidents: 1. That it concerns Matter merely Spiritual
 and determinable in the *Ecclesiastical Court*, as for calling him
Heretick, Schismatick, Adulterer, Fornicator, &c. 2. It ought
 to concern Matter merely Spiritual only, for if such Defa-
 mation touches or concerns any thing determinable at the
 Common Law, the *Ecclesiastical Judge* shall not have Conu-
 fans of it. 3. Altho' such Defamation is merely Spiritual
 and only Spiritual; yet he who is defam'd can't sue there for
 Amends or Damages, but the Suit ought to be only for the
 Punishment of the Sin, *pro salute anime*. And as to the first
 and 2d, the Case in 22 E. 4. 20. a. b. was cited to this Effect:
 The Abbot of St. Albans sent his Servant to a Feme Covert
 to come to his Master and speak with him, the Servant per-
 form'd his Command, and thereupon the Woman came with
 him to the Abbot; and when the Abbot and the Woman were
 together, the Servant (who knew his Master's Will) withdrew
 from them, and left them two in the Chamber alone; and
 then the Abbot said to the Woman, That her Apparel was
 gross Apparel; to whom the Woman said, That her Appar-
 el was according to her Ability, and according to the Abili-
 ty of her Husband: The Abbot (knowing in what Women
 repose Delight) said to her, That if she would be rul'd by
 him, that she should have as good Apparel as any Woman in
 the Parish, and solicited her Chastity; when the Woman
 would not consent to him, the Abbot assaulted her, and
 would have made her an ill Woman against her Will, which
 she would not suffer, whereupon the Abbot kept her in his
 Chamber against her Will, and to the Intent, &c. The Hus-
 band having Notice of this Abuse to his Wife, spoke of all
 this Matter and said, That he would have his Action of false
 Imprisonment against the Abbot, for that he had imprison'd
 his Wife; whereupon the Abbot (adding one Sin to another)
 sued the innoc. and poor Husb. for Defamat. in the Spirit. Court,
 because the Husb. had publish'd, that the Lord Abbot had soli-
 cited his Wife's Chastity, and would have made her an ill Wo-
 man:

16.

M. 44 & 45 Eliz.
in B. R. Bar-
ham's Case.

(a) Co. Emr. 24.

Numb. 22.

Cr. El. 834.

1 Rolls 73, 82.

Yelv. 21. Nov. 155.

Hut. 65.

Cr. Jac. 438.

1 Siderf. 52.

3 Bullfr. 83.

(b) Stamf. Cor.

36. a. 11 H. 7. 1. b.

Br. Corone 226.

Hales pl. Cor. 85.

86. 3 H. 7. 10. a.

11 Co. 29. a.

2 Inst. 188.

Cr. Car. 376, 377

1 Jones 351

3 Inst. 66, 67.

Cr. El. 834.

10 E. 4. 14. b.

49 H. 6. 14. b. in

lib. E. 4.

(c) Antea 17. b.

1. a. 15. b.

Godb. 278.

Poph. 211.

Hut. 38, 65, 113.

1 Rol. 71, 72, 73.

1 Mod. Rep. 19, 23.

La tch. Palm. 29.

3 Bullfr. 74.

(d) Antea 17. b.

1 Siderf. 52.

March 109, 110.

2 Rol. Rep. 145.

Cr. Car. 236, 243.

443, 3 Bullfr. 72, 83

1 Rolls Rep. 227.

Hut. 65. Cr. Jac.

107, 126, 241, 514.

Cr. El. 497.

Hob. 2, 3, 45, 268.

Allen 32. Stiles 46.

Yelv. 21.

1 Rol. 82, 83, 84.

Hecl. 174.

17.

T. 25 El. in B.R.

Palmer & Thorpe

2 Inst. 492.

27 H. 8. 14. b.

Cr. Car. 229.

Cr. Jac. 462.

5 Co. 51. a.

Dr. Prohibition

14.

man: But upon all this Matter disclos. to the Court, the Husband had a Prohibition, because the Husband might have an Action at the Common Law for this Assault, and Imprisonment of his Wife, altho' he then had no Action, nor perhaps never would; yet because the Scandal determinable in the Ecclesiastical Court, was upon the Matter disclos'd, mix'd with Matter determinable at the Common Law, for this Cause upon a Motion made by the Abbot's Counsel to have a Consultation in that Case, it was deny'd by the Court. Vide 18 E. 4. 6. 12 H. 7. 22. Regist. 46, 47, & 54. As to the third, vide the Statute of *Articuli Cleri*, cap. 1, 2, & 3, and the Statute of *Circumspecte agatis*, anno 13 E. 1. and F. N. B. 51. J. K. 52. D. M. 53. A. F. So it appears there, if a Parson sues in the Spiritual Court for laying violent Hands upon him, and to have him excommunicated, or have corporal Punishment, and not for Damages or Amends; but the Plaintiff shall recover Costs there: And if the Defendant in Case of Defamation is put to corporal Punishment, or for laying violent Hands upon Clerks, &c. if the Party will redeem his Penance, and agree to pay the Party damnify'd a certain Sum of Money, it appears there, that the Party dampnify'd shall have Suit for this in the Spiritual Court, and no Prohibition lies; and upon these Differences you will better understand the better Opinion in 12 H. 7. 22. and the Sense of the Regist. 54. where all the Justices refused to grant a Consultation in Case of Defamation, *id est*, either because the Matter of the Defamation was not meer and sole spiritual, or that the Plaintiff su'd for Damages or Amends for such Defamation; and therewith agrees F. N. B. 53. f.

These Resolutions concerning Scandals (which I amongst many others for my private Instruction have observ'd) at the importunate Request and Desire of my good Friends, some in the Realm of Ireland, and others dwelling in the remote Parts of England, out of the Meridian of Westminster, I have reported, but in a Summary and succinct Manner, as you see, omitting many others which I do not think necessary to be publish'd, my Opinion always being, *Quod multo melius est pauca idonea effundere, quam multis inutilibus homines gravari*. And nevertheless these brief Resolutions, and the Reason of them being well understood, and observed, will peradventure give great Direction and Instruction *pro multis aliis*, and will deter Men, for Words which are but Wind, from subjecting themselves to Actions, in which Damages and Costs are to be recover'd, which sometimes trench to the great Hindrance and Impoverishment of the Speakers.

Copyhold Cafes.

Copyholder in Fee by Licence made a Lease for Years, the Lessee entred; the Copyholder having Issue a Son and a Daughter by one *Venter*, and a Son by another, dy'd the eldest Son dy'd before Admittance; it was adjudg'd, that the Land should descend to the Daughter of the whole Blood. And in this Case three Points were resolv'd *per totam Curiam*.

1. Altho' a Copyholder has in Judgment of Law but an Estate at Will, (a) yet Custom has so established and fix'd his Estate, that by the Custom of the Manor it is descendible, and his Heirs shall inherit it, and therefore his Estate is not merely *ad voluntatem Domini*, but *ad voluntatem Domini secundum consuetudinem manerii*: So that the Custom of the Manor is the (b) Soul and Life of Copyhold Estates, for without Custom, or if they break their Custom, they are subject to the Lords Will; and by Custom a Copyholder is as well inheritable to have his Land according to the Custom, as he who has Freehold at the Common Law, for (c) *Consuetudo est altera lex*: Custom and Usage from Time whereof, &c. may create and consolidate Inheritances; for (d) *Consuetudo vincit commun' legem*. And Copyhold Estates are of great Antiquity, for * *Bracton*, who wrote in the Time of the Reign of K. H. 3. writes of them, *lib. 2. cap. 8.* where he says, *Si ipse ad alium transferre voluerit, prius illud restituat Domino, vel servienti (id est Seneschallo manerii) si Dominus presens non fuerit, & de manibus illorum fiat translatio ad alium, &c. quia ille non habet potestatem transferendi, cum liberum tenementum non habeat. Et eodem libro, folio 76. Et semper in hujusmodi focagiis consuetudo loci est observanda. Anno 4 E. 1.* (who was the Son of H. 3.) by the Stat. call'd (e) *Extenta Manerii*, there it is said, (e) *Inquirend' est de liberis tenentibus quibuscunq; &c. Inquirend' est etiam de custumaris, viz. Quot sunt custumarii, & quantum terra quilibet*

Brown's Case.
M. 23 & 24 Eliz.
in C. B.
Moor 125, 126.
1 Leon. 4.

The 1 Point
(2) 3 Co. 8. a.
Lit. SeG. 77.
9 Co. 105. b.
6 Co. 37. b.
Cr. Car. 45.
Hctly 6. Post. 24. b.
Co. Lit. 60. b.
8 Co. 64. a.
2 Co. 17. a.
Moor 60, 61.
Yelverton 223.
(b) Hctly 6. Post.
23. b.

(c) Co. Lit. 58. b.
(d) Co. Lit. 33. b.
(e) Co. Lit. 59. a.
Bract. lib. 2. c. 8.

3. * Postea 24. b.
Co. Lit. 59. a.
Bract. lib. 2. c. 8.

(e) Co. Lit. 58. a.

'quilib' customar' teneat, que opera, quas consuetud' faciat, & quant' opera & consuetud' cujuslib' custom' valeant per ann' & quant' reddit' de reddit' Assise per ann', prater opera & consuetud' que possunt talliari, & que non ad voluntat' Domini. By which it appears, that the whole Parliament esteemed of them as of customary Tenants; 2. That their Rent is accounted Parcel of the Rent of Assise: 3. That some of their Customs within some Manors are arbitrary at the Lords Will, (a) as Fines incertain, &c. and within some Manors their Customs are certain, and all that as Custom has allow'd.

(a) Co. Lit. 59. b.
60. a. Postea 27. b.

42 E. 3. 25.
* 1 Rolls 506.

42 E. 3. 25. a. b. The Lord brought an Action of Trespass against his Copyholder, who pleaded, not guilty; * The Jury gave a special Verdict, that the Copyholder had not done his Services, by which he broke the Custom of the Manor, for which Reason the Entry of the Lord was adjudg'd lawful, and that he should have the Corn then growing; which proves that he enter'd for the Forfeiture, and could not put him out without Cause: So 33 E. 3. *Tressp.* 254. If a Copyholder makes an Alienation, it is a Disseisin to the Lord, and a Forfeiture of his Estate.

13 R. 2.
(b) Co. Lit. 60. a.

13 R. 2. *Faux Imprisonment* 7. It is there adjudg'd, that where an Heir of a Copyholder recover'd in a Plaint in the Nature of an Assise of *Mordancester*, in the Court of the Bishop of London, of his Manor of *Stepney* in *Middlesex*, the Tenant brought a Writ of false Judgment returnable in *C. B.* which Writ of (b) false Judgment did not lie in that Case; But there it is said, that he has no other Remedy, but to sue to the Lord, who has the Freehold by (c) Petition, and he may if there be Cause, reverse the Judgment; by which it appears, that the Heir of a Copyholder is inheritable according to the Custom, and shall recover by Plaint in Nature of an Assise of *Mordancester*; but it is true that *Charleion* there says, that he shall not have an Assise against his Lord as Tenant in ancient Demesne shall have, because he has not the Freehold, as *Bracton* says.

(c) Co. Lit. 60. b.
Lit. Sect. 77.
Postea 30. b.

2 H. 4. 12. a.

(d) Fitz. Tresp. 168
Br. Tresp. 73.
Br. Ten. per Copy
2.

2 (d) H. 4. 12. a. A Copyholder brought an Action of Trespass for breaking his Close, and cutting his Trees, and the Defendant pleaded not guilty, the Jury found the Defendant guilty; and assessed Damages, and the Plaintiff recovered.

1 H. 5. 11, 12.

1 H. 5. 11, 12. A Copyholder may surrender to the Use of another, reserving Rent with Condit. of Re-entry for Non-payment, and for Default of Payment, may re-enter, 4 H. 6. 11 & 21 H. 6. 37. If a Bishop grants customary Lands by Copy and dies, the Copyhold is not determin'd by his Death, for he was *Dominus pro tempore*, and this Grant shall bind the King, and the Grantee, (the Temporalities being in the King's Hands) shall have Aid of the King.

7 E. 4. (a) Danby Chief Justice said, That a Copyholder is as well inheritable to have his Land according to the Custom, as he who has a Freehold at the Common Law.

21 E. 4. 80. b. (b) Brian said, that his Opinion always had been and ever should be, That if such Tenant by the Custom paying his Services be ejected by his Lord, that he should have an Action of Trespass.

(c) 15 H. 7. 10. a. & (d) 27 H. 8. 28. a. b. A Bishop grants Lands by Copy and dies, the Temporalities come into the King's Hands, the Copyhold Estate stands, and he shall have Aid of the King.

15 H. 8. Tenant per Copy Brook 24. The Heir of a Copyholder Tenant in Tail shall recover in a (e) Formedon in the Disceuder per omnes Jusficiarios. By which Cases it appears, that the Judges in all Successions of Ages have allow'd Copyhold Estates to be establish'd and sure by the Custom of the Manor, and descendible to their Heirs as other Inheritances are.

2. It was resolv'd, when Custom has created such Inheritances, and that the Land shall be descendible, then the Law will direct the Descent according to the Maxims and Rules of the Common Law, as (f) Incidents to every Estate descendible; *Quia quod iacite intelligitur deesse non videtur*. As 5 E. 4. 7. b. when Uses had gain'd the Reputation of Inheritances descendible, the Common Law directed the Descent of them, and that there should be *possessio fratris* (g) of an Use, as well as of other Inheritances at the Common Law: But it was resolv'd, that such customary Inheritances should not have by the Law any other collateral Qualities which do not concern the Descent of the Inheritance, which other Inheritances at the Common Law had: And therefore such customary Inheritance should not be * Affets to charge the Heir in an Action of Debt, on a Bond made by his Ancestor, altho' he binds himself and his Heirs, neither shall the Wife of such customary Tenant be (h) endow'd, nor shall the Husb. of a Woman Inheretrix, of such Estate be † Tenant by the Courtesie, nor shall a (i) Descent of such Estate toll the Entry of him who has a customary Right to it, & sic de ceteris; for as without Custom such Estate at Will can't be descendible, so without Custom it can't have any (k) collateral Quality or Incident to other Inheritances at Common Law: For Copyholders have Estates of Inheritances *secundum quid*, that is to say, to be descendible by Custom to their Heirs, and not to be determined by their Deaths, nor subject to the Lords Will, as other Estates at Will are, but they are not Estates of Inheritance *simpliciter*, s. to all other collateral Qualities, but such as Custom has allow'd, or are incident to them.

7 E. 4. 19. a.
(a) Co. Lit. 60. b.
61. a. Lit. Sect. 77
9 Co. 76. b.
2 Leon. 209.
21 E. 4. 80. b.
(b) 2 Leon. 209.
Lit. Sect. 77.
Co. Lit. 60. b. 61. a.
15 H. 7. 10. b.
27 H. 8. 28.
(c) Fitz Aid de
Roy 98.
Br. Aid de Roy 49.
(d) Br. Aid de
Roy 1.
15. H. 8.
(e) 1 Rol. 838.
Co. Lit. 60. a. b.
9 Co. 8. 9.
Cr. Car. 42, 43.
44, 45.
Popham 34, 35.
The 2 Point.
(f) Postea 23. a.
(g) 1 Co. 88. a.
121. b. Raym. 317.
Dy. 10. b. 11. a. pl.
40. Br. Descen. 36
Plowd. 58. a.
Bac. Read. ca.
27 H. 8. c. 10. p. 9.
Fitz. Subp. ca. 14
1 And. 192.
2 And. 146.
Co. Lit. 14. b.
* Poph. 188.
(h) 2 Bullst. 337
Postea 30. b.
Co. Lit. 33. a.
2 Sid. 139.
Hob. 215.
† Cro. El. 361.
Hunt. 17. Mo. 272.
597. 2 Bullst. 337.
Postea 22. b.
1 And. 192.
1 Rol. Rep. 126.
(i) Postea 23. a.
Cro. Jac. 36.
(k) Hob. 215, 216.

The 3^d Point. 3. It was resolv'd, That where the customary Estate of Inheritance descends to the Heir, (a) before Admittance he may enter and take the Profits, and that shall be a (b) *possessione fratris* before Admittance on an actual Possession as in the Case at Bar : And such Heir may surrender to the Ld. to the use of anoth. before Admitt. as any other Copyholder may, but it can't prejudice the Lord of his Fine due to him by the Custom of the Manor upon the Descent, and he is a Tenant by Copy of Court-Roll, for the Copy made to his Ancestor belongs to him ; as the (c) Admittance of a Tenant for Life, is the (c) Admittance of him in remainder to vest the Estate in him, but shall not bar the Lord of his Fine, which he ought to have by the Custom : And altho' it was objected, that every * Admittance of an Heir upon a Descent amounted to a (d) Grant, and so may be pleaded, and therefore nothing shall vest in the Heir before Admittance. To that it was answer'd and resolv'd, That true it is, that after Admittance the Heir may in pleading alledge (e) it as a Grant, and that has been allow'd to avoid the Inconvenience which would otherwise ensue ; for if the Copyholder should in pleading (f) be compelled to shew the first Grant, either it was before Time of Memory, and then it's not pleadable, or within Time of Memory, and then the Custom fails, and therefore the Law has allow'd the Copyholder in pleading to alledge any Admittance, as well upon a Descent (g) as upon Surrend. as a Grant ; and yet he may, if he will alledge the (h) Admittance of his Ancestor as a Grant, (i) and shew the Descent to him, and that he entred, and well without any Admittance of him ; but the Heir can't (k) plead, That his Father was seised in Fee at the Will of the Lord by Copy of Court Roll of such a Manor according to the Custom of the Manor, and that he dy'd seised, and that it descended to him, for in Truth such Interest is but a (l) particular Interest at will in Judgment of Law, altho' it is descendible, as has been said, by Custom : For he is a Tenant at the Will of the Lord according to the Custom of the Manor. *Nota* Reader, all these Resolutions and Opinions have been confirm'd and adjudg'd, as appears by the Cases following :

2. It was agreed by the two Chief Justices, *Wray* and *Anderson*, Justices of Assize there upon Evidence to a Jury, that where a Woman Copyholder in Fee takes an Husband who has Issue, and the Wife dies, that the Husband shall not be Tenant by the Courtesy without special Custom, according to the Resolution aforesaid ; and according to their Opinions the Jury passed against the Husband.

In Lent Assizes
24 El. in Suff. in
River's Cafe.
(m) Antea 22. a.
Cr. El. 361.
Hur. 17. 2 Bullf.
337. Mo. 272, 397
1 Roll. Rep. 126.
1 Anders. 192.

It was adjudg'd, that where by the Custom of the Manor, Plaints have been made in the Court of the Manor in Nature of real Actions, that if a Recovery be in a Plaintiff in Nature of a real Action against Tenant in Tail (admitting that Copyhold Land may be (b) entailed) that it should be a Discontinuance, and should toll the Entry of the Heir in Tail; for in as much as Plaints in Nature of real Actions are warranted by the Custom, it is an Incident which the Law annexes to the said Custom, that such Recov. shall make a (c) Discontinuance, which agrees with the Reason of the principal Point in *Brown's Case*.

It was adjudg'd, That if a Man seised of Copyhold Land in the Right of his Wife, surrenders it to the Use of another in Fee, who is admitted accordingly, the Husband dies, it is no (d) Discontinuance to the Wife or her Heirs, but that the Wife may enter, and shall not be put to *Cui in vita*, nor her Heir to *Sur cui in vita*. And if a Copyholder for Life surrenders to the Use of another in Fee, it is no (e) Forfeiture, for it passes by Surrender to the Lord, and not by Livery; and Copyhold Estates shall not have such Qualities as Estates at Common Law have without special Custom, as has been often said.

In this Case two Points were adjudg'd. 1. That (b) a Descent of a Copyhold in Fee shall not toll the Entry of him who has Right to the Copyhold, which agrees with the Resolution in *Brown's and the other Cases before*. 2. That where the Custom of the Manor of *Allesley* in the County of *Warwick*, was, That Copyhold Lands may be granted to any Person in *feodo simplici*, that a Grant to one and his Heirs of his (i) Body is within the Custom: For be it a Fee-simple conditional, or an Estate Tail, it is within the Custom. So he may grant for Life or for Years by the same Custom, for an Estate in Fee-simple includes all; and it is a Maxim in Law, * *Cui licet quod majus, non debet quod minus est non licere*.

Rich. (k) Fitch, the Father, Copyholder in Fee, makes a Surrender to the Use of himself for Life, and after to the Use of *Rich.* his Son for Life, and after to the Use of his Last Will; the Father is admitted and dies, and afterwards the Lord pretending Cause of Forfeiture grants it to a Stranger: In this Case two Points were adjudg'd. 1. That the Admittance (l) of Tenant for Life, was Admittance of him in the Remainder, but not to prejudice the Lord of his Fine, which was due by the Custom of the Manor according to the Opinion in *Brown's Case*. 2. It was adjudg'd, that the Fee simple of the Copyhold being limited to the Use of his Will, (m) remain'd in the Copyholder, and not in the Lord.

Three

9 Co. 48. b. Pasch. 36 Eliz. in B. R. Rot. 331. inter *Fitch & Huckleley*. (k) Cr. El. 441, 442. (l) Cr. El. 148, 442. (m) Cr. El. 504, 662. Cro. Jac. 31. Noy 29, Moor 358, 465. 1 Mod. Rep. 102. 2 Brownl. 201. 1 Roll. 505. 1 Vent. 260. 3 Kelw. 329.

3.
Trin. 36 Eliz. Rot. 547. in B. R. (a) Local & Riggden. Moor 358. Cro. Eliz. 372. 1 Rol. 634. Like Judgm. in B. R. M. 36 & 37 Eliz. inter *Clun & Peale*. Rot. 1417. (b) Moor 358. 1 Rol. 506, 634. 3 Co. 8, 9. Cro. El. 391. Cr. Car. 43. (c) Cro. El. 391, 392. 1 Rol. 634.
4.
Pasch. 35 El. in B. R. Rot. 734. inter *Bullock & Dibley* in Transgraf. in Berk. (d) Moor 596. Poph. 38, 59. Cro. Jac. 105. 1 Roll. 632. Cro. Car. 7. 3 Co. 9. a. Like Judgm. in B. R. Eliz. inter *Wright & Portman*. (e) Cart. 238. Et 35 Eliz. in C. B. inter *Foxton & Colston*. Like Judgm. given.
5.
M. 35 & 36 El. in B. R. inter *Gravenor & Ted*. (g) Antea 22. a. Cro. Jac. 36. (h) Cr. El. 148, 149, 307, 717. Cro. Car. 42, 43, 44, 45. Poph. 33, 34, 35, 128, 129. Godb. 367, 368, 369. 3 Co. 8, 9. Co. Lit. 60. a. b. 1 Rol. Rep. 48, 49. 2 Rol. Rep. 383. O Bendl. 163, 164 165, 166, 167. 1 Roll. 838. Moor 188. 1 Leon 174, 175. (i) Postea 30. a. Godb. 20. Co. Lit. 52. b. Cr. El. 323, 373. 1 Rol. Rep. 48. 1 Roll. 511, 512. 1 Leon. 64. * 5 Co. 7. a. *Cawdry's Case*.

7. Three Points were adjudg'd : 1. That the Heir of a Copyholder may enter and have an Action of Trespass (a) before Admission, and so if such Heir dies before Admission (as the principal Case was) his Heir may enter and take the Profits, and have an Action of Trespass, which agrees with the Judgment in the principal Point in *Brown's Case*; and in this Case *Wray Chief Justice* said, that 'twas now late-adjudg'd, that there should be (b) *possessione fructibus* on a Descent of Copyhold before Admittance. 2. It was adjudg'd, that where King *H. 8.* granted a Manor to the Queen his Wife for Life, that there the (c) Queen was a sole Person exempt by the Common Law, and may make a Lease or Grant without the King, and so may plead and be impleaded alone. *Vide* 10 *E. 3.* 18 & 50. 18 *E. 3.* 1, 2, & 32. 20 *E. 3.* Nonability 9. 32 *E. 3.* Brief 346. 49 *E. 3.* 4. 11 *H. 6.* 67. 26 *H. 6.* *Aide del Roy* 24. 3 *H. 7.* 14. 7 *H. 7.* 7. and that the Statute of 32 *H. 8.* is but a Declaration of the Common Law. 3. It was adjudg'd, that where the Queen was Tenant for Life, and a Copyhold of Inheritance escheated to her, there the Queen may grant it to whom she pleases, and it shall bind the King, his Heirs and Successors for ever; for she was *Dominica pro tempore* and the Custom of the Manor shall bind the King. And it was resolv'd that every one who has a (d) lawful Estate or Interest in a Manor, be it in Fee, in Tail, in Dower, or Tenant by the Courtesy, or for Life, or Years, or as Guardian, or Tenant by Statute, or *Elegit*, or at Will, if a Copyhold escheats or comes to their Hands during their Time, every one of them at their Wills may regrant it *reddend'* the ancient Rent, Customs, and Services, and it shall bind the Lord who has the Inheritance or Freehold of the Manor, for every one of 'em is *Dominus pro tempore*, and within the Custom; as in 20 *H. 6.* 8. *b.* the Chief Justice (e) of the *Common Pleas*, who has his Office but at Will, may by Custom grant Offices for Life: and it is to be observ'd, that a Copyholder doth not derive his Estate out of the Estate or Interest of the Lord only, for then the Copyhold Estate would cease when the Estate of the Lord determines. But as it was said in *Brown's Case*, * the Soul and Life of a Copyhold is the Custom of the Manor; and when the Grant is made by any who has a lawful Estate, or Interest, the Copyholder is in by the Custom without any Regard to the Estate, or Person of the Grantor, and therefore such Grant made by Husband and Wife shall bind the Wife notwithstanding the Coverture: So of a Grant made by *Non compos mentis*, or an Infant, or by a Bishop, Prebendary, Parson, &c. it shall bind for ever; For the Custom is, that the Tenements are Parcel of the Man. *Et dimiss' & dimissib' per Dom' Man' &c. pro temp' exist', seu per egru Senesch', &c.* And so a Feme Covert, *Non compos mentis*, an Infant, the

Tr. 26 El. Clarke
v. Pennifather in
B. R.

(a) 1 Rol. 502.
Dy. 291. pl. 69.
Lane 20. Cr. El.

90, 148, 662.
Cr. Jac. 36.
Plowd. 529.

Yelv. 144, 145.
1 Brownl. 145.
Poph. 39. Antea

22. b.
(b) Moor 125, 126,
597. 1 Bullst. 42.

Poph. 35.
(c) Praef. 6.
Rep. p. 3. Co. Lit.

3. a. 133. a.
Plowd. 231. a.
Seld. Tit. of Honour

86.
9 Co. 47. a.
FitzNonability 9

Selden's Epinomis
11.

(d) Co. Lit. 58. b.
59. a.

Cr. Jac. 98.
1 Roll. 499.
2 Roll. 41.

(e) 6 Co. 60. b. 61. a.
Dy. 71. pl. 44.

* Antea 21. a.
Hertl. 6.

Vide 17 Eliz.
E. of Arundel's
Case Dyer 342.
Cr. El. 662.

the Successors of Bishops, Prebendaries Parsons, &c. are bound by the said Custom: But by Force of these Words in the said Custom (*per Dom' Maner' &c. pro temp' exist'*) in some Case the Lord ought to have lawful Estate, and in some Case not. And therof. this Difference was unanimously agreed; if a Disseisor, or Feoffee of a Disseisor, or any other who has a torcious or defeasible Estate or Interest subject to the Action, or Entry of another, holds Court, and makes any voluntary (a) Grant upon Escheat, or Forfeiture of a Copyhold, such voluntary Grant shall not bind him who has Right, when he has recontinu'd the Manor by Action, or Entry; for to this Intent the said Custom shall be intended of a Lord who has a lawful Estate or Interest: But if such Lord who has a wrongful or defeasible Estate, (b) admits any upon Surrender made to the Use of another, or admits the Heir upon a Descent, such Admittances are good, and within the said Custom; for such Acts are lawful, and *quodam modo* judicial, to do which he may be compell'd and enforc'd in a Court of Equity, and therefore such Admittances shall bind him who has Right.

It was adjudg'd, that where the Lord of a Manor wherein were many Copyholders for Lives took a Wife, and afterwards a Copyholder dy'd, the Lord after Marriage granted the Land again according to the Custom of the Manor for Lives, and died, that the Wife should not (c) avoid these Grants in a Writ of Dower; for altho' the Grant was after the Title of Dower, yet the Custom which is the Life and Force of the Grant, was long before: And an Opinion in 8 *Eliz.* was cited to the contrary, (which now *vide Dyer* 251.) and yet Judgment *ut supra.* If Feoffee of a Manor upon Condition makes voluntary Grants of Copyhold Estates according to the Custom, and afterwards the Condition is broke, and the Feoffor re-enters, yet the Grants by Copy shall stand; and therewith agrees the Judgment *anno 17 Eliz. the Earl of Arundel's Case, Dyer* 342.

It was adjudg'd, if Tenant *pur (d) auter vie* be of a Manor, and *Cestuy que vie* dies, and he who was Tenant for Life continues in the Manor, and holds Courts, and makes voluntary (e) Grants by Copy, they shall not bind the Lessor; (it is otherwise of (f) Admittances on Surrender to the Use of others, or upon Descent) for in such Case it was resolv'd, that he was Tenant at Sufferance, who has no lawful Interest;

(a) Co. Lit. 58. b. 1 Roll. 503. 1 Co. 140. b. Moor 112, 237. Cr. El. 699. Poph. 71. 3 Bullst. 215.

(a) Co. Lit. 58. b.
1 Co. 140. b.
Cr. El. 699.
1 Roll. 499.
Mo. 112, 236, 237
Poph. 71. Ow. 28.
Dal. 83.

(b) 1 Roll. 503.
1 Co. 140. b.
Moor 112, 237.
Cr. El. 699.
Co. Lit. 58. b.
3 Bullst. 215.
Poph. 71.

8.

P. 26 El. in B. R.
(c) 8 Co. 63. b.
Mo. 758, 812.
1 Roll. 684.
2 Brownl. 208.
Bridgm. 51.
1 Leon. 16.
Godb. 130.
2 Siderf. 82.
Dy. 251. pl. 89.

9.

P. 29. El. inter
Rous & Arters,
in B. R.
(d) Moor 236.
Owen 27, 28.
2 Leon. 45, 46.
(e) Co. Lit. 58. b.
1 Co. 140. b.
Cr. El. 699.
1 Roll. 499.
Mo. 112, 236, 237.
Poph. 71. Ow. 28.
Dal. 83.

Interest; and a Writ of Entry *ad Terminum qui praterit* lies against him, and so he is a Disseisor of the Manor.

10.

M. 33 & 34 El.
in B. R. inter
Murrel & Smith
in Trespafs,
(a) Cr. El. 252.
2 Leon. 209.

Upon a special Verdict the Case was such; Queen *Eliz.* seized in Fee of the Manor of *Bawdesey Butley* in *Suffolk*, granted Part of it being ancient Copyhold Land to *Smith* the Father in Fee; and afterwards the Queen granted the Inheritance of the said Copyhold to a Stranger in Fee; and afterwards *Smith* made his Will in Writing, and thereby devised the Copyhold to *Murrell* the Plaintiff in Fee; and at a Court held at the said Manor surrendered into the Hands of the Queen, Lady of the said Manor, to the Use of his Will; and in pleading, *Smith* the Defendant alledged the said Grant made to his Father, by Force whereof he was seized, &c. and so seized, died seized, and that it descended to the Defendant as his Son and Heir, and the Plaintiff claiming by the said Devise and Surrender, traversed the Descent to the Defendant: And the Jurors upon this special Issue, gave the said special Verdict; and upon great Advice and Deliberation Judgment was given against the Plaintiff; and

The 1 Point

(b) 8 Co. 64. a.
Antea 21. a.
2 Co. 17. a.
Postea 24. b.
Cr. El. 103.
Cr. Jac. 573.
Hob. 181.
(c) 5 Co. 113. a.
6 Co. 57. b. 68. b.
8 Co. 63. b.
Co. Lit. 309. b.

(d) Co. Lit. 58. b

(e) Co. Lit. 58. b.
Postea 21. b.

in this Case three Points were resolv'd. 1. That Custom has so establish'd and fix'd the Estate of a Copyholder, that by the (b) Severance of the Inherit. of the Copyhold from the Manor, the Copyhold is not destroy'd, for inasmuch as the Lord himself cannot oust the Copyholder, no more can any claiming under him do it; for (c) *Nemo potest plus juris ad alium transferre, quam ipse habet; & quod per me non possum, nec per alium.* But it was objected, that every Copyhold Estate in any Land or Tenement. ought to stand upon two Pillars, and without either of them can't be supported; the one that the Land or Tenement be (d) Parcel of the Manor, the other that such Land or Tenement has been demised (e) and demisable Time out of Mind, so that parcel of the Manor, and Prescription are two Incidents to every Copyhold; but in the Case at Bar one of them fails, for by the said Severance the Land was not Parcel of the Manor. To which it was answer'd and resolv'd, forasmuch as the Land was Parcel of the Manor, and Custom has once establish'd and fix'd the Estate, so that once it had both the Incidents, for this Cause the Severance made by the Lord after the Estate has had its Perfection, shall not destroy the Estate of the Copyholder. 2. That in this Case the said customary Lands descended to the Def. notwithstanding the Devise and Surrend. for the Surrend. after the Severance of the Inherit. of the Copyhold from the Manor was utterly void, because the Lands were not Parcel of the Manor at the Time of the Surrender, and the Devise alone can't transfer such customary Estate; for as it appears by **Bracton* before, and by *Litt. f. 15. b.* it can't be transfer. but

The 2 Point

* Antea 21. a.
Co. Lit. 59. a.
(f) Lit. Sect. 74.
Co. Lit. 58. b. 59. a.

by (f) Surrend. into the Hands of the Ld. accord. to the Cust.

of the Manor. 3. That after the Severance, the Copyholder shall pay his Rent to the Feoffee, and also shall pay and do other (a) Services which are due without Admittance or holding of any Court; as to plough the Lords Demens, Heriot, and such like; but Suit of (b) Court, and fine upon Alienation, or Admittance, are gone: For now the Land or Tenement can't be aliened, for as the Copyholder has some Benefit by his Severance, as appears before, so has he great Prejudice, for now he can't (c) surrender or alien his Estate, because he can't alien it by Surrender *in manus Domini servitorum*, as the Custom has warranted, and that he can't now do, nor can the Feoffee make Admittance or Grant of the Copyhold, for he is not *Dominus pro tempore*: But it was resolv'd, that such (d) Forfeitures as were Forfeitures before the Severance, as the making of a Feoffment, Lease, Waste, denying of Rent, or such like, are Forfeitures also after the Severance. So if Land was of the Nature of Borough *English* or Gavelkind before the same Custom, all other Customs which run with the Land, shall remain after the Severance: And it was said, if such Copyholder will alien, there is no Means but to have a Decree against him and his Heirs in *Chancery*, but thereby the Interest of the Land is not bound, but the Person only.

The 3 Point

(a) Cr. El. 252.

(b) Cro. El. 252.
Moor 393.

(c) Cr. El. 252.

(d) Cr. El. 252, 499
2 Leon. 203.
Moor 393.
1 Bull. 51.

THE Case was, a Copyholder in Fee of the Manor of the Dean and Chapter of *Westminster*, call'd *Launton* in the County of *Oxford*, surrender'd his Copyhold Lands out of Court, by the Hands of certain Copyhold Tenants according to the Custom of the Manor, to the Use of another and his Heirs upon certain Conditions, and after at the next Court, the Surrender was presented, but in the Presentment the (b) Conditions were omitted, and he to whose Use the Surrender was made being (c) dead, the Lord by the Steward, according to the Custom, admitted his Daughters and Heirs, who entred; he who made the Surrender by his Deed, releas'd to the Daughters being in Possession, and afterwards entred upon them, and if his Entry was lawful or not was the Question: And it was adjudg'd, that his Entry was not lawful; and in this Case, two Points were resolv'd, 1. That the Presentment of the said Surrender was (d) void, for the Surrender out of Court ought by the Custom of the Manor, to be presented in Court; but forasmuch as the Surrender was upon Condition, and the Presentment was of an absolute Surrender, the Surrender which the Copyholder made was not presented: But if the Truth of the Case was, that the Surrender conditional was presented, and the (e) Steward in entring thereof omitted the Condition, yet upon good Proof thereof, the Surrender should not be avoided, but the

IT.

P. 31 El. inter
Kite & Queinton
in B. R.
(a) Co. Lit. 62. a.(b) 1 Roll. 504.
(c) Postea 29. b.
Bridgm. 51.

(d) 1 Roll. 504.

(e) 1 Roll. 504.

(a) 1 Roll. 501.
(b) 1 Roll. 501.

Roll should be (a) mended, for the Roll should not (b) conclude in such Case the Party either to plead, or give in Evidence the Truth of the Matter. The 2d Question and the greater Doubt was, If by the said Release by Deed, the Customary Right of the Copyholder was extinct, and he who made the Surrender barr'd of his Right. And it was objected that *Littleton Fol. 15. b.* saith, That a Copyholder can't alien his Land by (c) Deed; but if he will alien, he ought according to the Custom, &c. surrender, &c. And he saith, that such Tenants are call'd Tenants by Copy, because they have no other Evidence concerning their Tenements, but the Copies of the Court-Rolls. And it was said, that that excludes all Releases by Deed, for then they would have other Evidences than the Court-Rolls. Also it was said, that he who Purchases the Land, may upon searching the Rolls be advised if the Title of the Land be good. But if a Release by Deed should extinguish Rights, then it would be very dangerous to Purchasers, for that doth not appear in the Rolls. To which it was answer'd and resolv'd, That the

(c) Lit. Sect. 74.
Co. Lit. 58. b. 59. a.

(d) Cr. Jac. 36. 101
Co. Lit. 59. 100. a.
1 Leon. 102.
1 Roll. 507.

(d) Release in the Case at Bar extinguish'd the Right of the Copyholder; and their Reason was, because he to whom the Release was made was admitted to the Tenements, and Copyholder in Possession; so that a Release of the customary Right may enure to him, and therefore the Lord is not at any Prejudice, for he has had his Fine upon Admittance, and he to whom the Release was made was in by Title, *scil.* by the Lords Admittance, and so the Release enures by way of Extinguishment: But if a Copyholder be (e) ousted by one by Tort, there his Release by Deed to the Disseisor, or other wrong Doer, doth not transfer his Right, nor bar him for two Reasons: 1. Because he has no customary Estate upon which the Release of the customary Right can enure. 2. It would be to the Lord's Prejudice, for thereby he would lose his Fine and Services; and for these Reasons, the Release by Deed in such Case is utterly void, and this is not against any thing *Littleton* saith, for *Littleton* speaks of an Alienation

(e) 1 Leon. 102.

(f) Lit. Sect. 74.
Co. Lit. 58. b. 59. a.
Antea 24. b.

by (f) Surrender, and that of Necessity ought to be into the Lord's Hands, according to the Custom: But the Release in the Case at Bar could not be made to the Lord, but to the Copyhold Tenant in Possession: Also he who claims a Copyhold Estate by Surrender, hath not other Evidences but Copies, and so are *Littleton's* Words to be intended. But he who claims Extinguishment of a Right, may have it by Release by Deed: So the Resolution in *Murrel's* Case before well agrees with the Judgment in this Case upon the Difference aforesaid, in transferring of an Estate, and extinguishing of a Right: And as to the Danger of Purchasers, it was said, that there was not any Danger; for if the Copyholder who is in Possession sells it, he will shew the Purchaser the Release made to him, and he who is out of

Possession, ought not to sell it till he has regain'd the Possession; and if any one will purchase any Title, he is not to be favour'd, but in such Case * *caveat emptor* : And yet he who has made such Release, may and ought to acquaint the Purchasor with that which he himself has done, and so no Mischief. And *Wray* Chief Justice in this Case said, That if one who has pretended Right or Title (a) to Copyhold Land, bargains and sells it to another, it is within the Statute of 32 H. 8. cap. 9. for the Statute saith, *If any bargain, buy, or sell, &c. any Right, or Title, in or to any Lands or Tenements* : So that these Words, *Any Right or Title*, extend to all Manner of Rights or Titles, & *per consequens* to Copyhold Lands. And great Part of the Land of the Kingdom is in Grant by Copy; and therefore the Intent of the Makers of the Act was to include it, for avoiding of Suits, Maintenance, and Champerty, and not to leave all Copyhold Estates to the Mischiefs mention'd in the Preamble of the said Act, and especially when a (b) Lease for Years has been adjudg'd in *Partridge's* and *Croker's* Case. *Flow. (c) Com. 76.* to be within the said Act.

* 5 Co. 84. a.
1 Roll. Rep. 195.
2 Bull. 337.

(a) Co. Lit. 369. b.
Cr. Car. 43.

(b) Dy. 74. pl. 193.
20. Plowd. 77. b.
78. &c.
Moor 266.
1 Leon. 166.
Sav. 95, 96.
1 And. 75, 76.
&c. 201, 202.
Goldb. 101, 102.
Dy. 374. pl. 16, 17.
(c) Plowd. 77.
78, &c.

William (a) *Melwich* brought an *Eject' firmæ* against *John Luter* and *Mary* his Wife, on a Demise made by *John Melwvch* of Land in *Estworth* in the County of *Salop*, for one Year, &c. The Defendant pleaded, not guilty; and the Jury gave a special Verdict to this Effect: The Abbot of *Tewksbury* was seised of the Manor of *Boveridge*, whereof the said Tenements in which, &c. were Parcel, and Copyhold Land of the same Manor; and that there were many other ancient Copyholds of the same Manor in *Estworth* aforesaid, which Manor came to the King by Dissolution. And the King anno 37 H. 8. granted the Inheritance of all the Copyholds in *Estworth*, to *John Ogden* and his Heirs, who call'd it his Manor of *Estworth*: And afterwards a Copyholder of the Tenements aforesaid, in which, &c. surrender'd them to the said *John Ogden*, who also being seised of the Manor of *Harbridge* within the same County, at *Harbridge*, granted the Tenements in which, to *John Melwvch* the Lessor of the Plaintiff by Copy, according to the Custom of the Manor of *Estworth* for Term of his Life, and that the Plaintiff was possessed till he was ejected by the Defendants, claiming it under the Title of *John Ogden*, pretending that the said Grant by Copy did not bind him. And afterwards upon good Advice, Judgment was given for the Plaintiff; and in this Case four Points were resolv'd.

12.

30 El. inter Melwvch & Luter in p. R.

(2) Cr. El. 102, 103

1. That Lessee of a Copyho. (b) for one Year shall maintain The 1 Point
(c) *Eject' firmæ*; for inasm. as his Term is warranted by the Law
by the gen. Cust. of the Realm, it is Reaf. that if he be ejected,
that

Moor 679.
3 Bull. 214.
Bridgm. 49, 50.
(b) 1 Roll. 846.
Hurr. 101.

E 2

(c) Cr. El. 102, 103, 224, 225, 394, 395. Cr. Jac. 403. 1 Leon. 328. Poph. 188. Owen 18. Lit. Resp. 223. Hele 126.

that he should have *Ejectione firmæ*, and it is a speedy Course for a Copyholder to have the Possession of the Land against a Stranger.

The 2 Point

(a) Cr. El. 103.
 Cr. Jac. 573.
 Annot. 24. b.
 2 Co. 17. a.
 3 Co. 64. a.
 Hob. 181.

2. That by the (a) Severance of the Inheritance of Copyholds from the Manor, the Copyholds were not destroy'd, but remain'd of Force and Effect, which agrees with the said Judgment in *Murrel's Case*.

The 3 Point

(b) Cr. El. 103,
 394, 395, 443, 662.
 Postea in Neale's
 Case.

3. When the Lord of a Manor having many ancient Copyholds in one Town, grants the Inheritance of all the Copyholds to another; the (b) Grantee may hold Court for the Copyhold Tenements, and take Surrenders to the Use of others, and make Admittances and Grants: For altho' it is not a Manor in Law, because it wants free Tenants, yet as to the Copyhold Tenants, the Feoffee or Grantee has such a Manor, that he may hold a Court to make Admittances and Grants of the Copyhold Tenements: For every Manor which consists of Freehold and Copyhold Tenements, comprehends

(c) Co. Lit. 58. a.

(a) Co. Lit. 58. a.
 4 Co. 33. b.
 6 Co. 11. b.
 8 Co. 60. b.
 9 Co. 48. b. 40. a.
 Godb. 49. 1 Rol.
 543. Cr. El. 792.
 Cr. Jac. 582.
 4 Inst. 266, 268.
 7 E. 4. 23. a.
 21 E. 4. 66. b.
 1 Mod. Rep. 171.
 12 H. 7. 16, 17.
 Br. Judges 18.
 Br. Court Baron 9
 B. N. C. 116.
 (c) Co. Lit. 58. a.

in itself in Effect two (c) several Courts; one which is commonly called the Court Baron, *s.* the Court of Freeholders, and in this Court the (d) Suitors, *s.* the free Tenants are Judges, and therewith agree 7 H. 6. 39 H. 6. 5. 6 E. 4. 3. 12 H. 7. 16. Another Court is for the Copyholders, and as to that, the Lord or the (e) Steward of the Manor is Judge; and as the other is called the Freeholder's Court, so this may be called the Copyholder's Court: And therefore when the Lord grants over the Inheritance of his Copyholds to another, the Grantee may hold such Court for the Copyhold Tenements only, as his Grantor might. And as to this Court it need not have any free Tenants; so if the Freeholds escheat, or if the Lord releases the Tenure and Services of all his free Tenants, yet the Lord may hold a customary Court for his Copyhold Tenements, and make Admittances and Grants of them; (f) *Benedicta est expositio, quando res redimitur a destructione.* Nota Reader, altho' the Lord by his own Act can't (g) make of one and the same Manor at the Common Law sundry Manors consisting upon Demeans and Freeholders, yet he may by his own Act, as by this Judgment appears, make a customary Manor consisting upon Copyholders, as to the Purposes aforesaid.

(f) Palm. 444
 Poph. 166.

(g) Cr. El. 39, 103,
 443.

The 4 Point

(h) 1 Roll. 499,
 500, 505.
 Co. Lit. 59. a. 61. b.
 (i) Postea 27. a.
 Owen 35.
 Co. Lit. 58. a.
 Cr. El. 103.
 1 Roll. 505.
 B. N. C. 387.
 Br. Court Baron
 22. Br. Tenant
 per Copy 26.

4. It was resolv'd, that the Lord (h) himself may make a Grant or Admittance of a Copyhold out of the Manor at what Place he pleases; but the (i) Steward of the Court of a Manor, can't at any Court held out of the Manor make Grants or Admittances.

13.
 Cr. El. 394, 395.
 Pasch. 27 El. in-
 ter Neale &

IT was adjudged by *Anderson* Chief Justice of the *Common Pleas, Walmsley, & totam Curiam*, That where the Lord of a Manor demises all his Lands granted by Copy to another for two thousand Years, that such Lessee

(a) may

(a) may hold a Court for the Copyholds, according to the Resolution of the third Point in *Melwiche's Case*. And in this Case it was said, that so it was resolv'd by all the Justices, in the Case of Sir *Chr. (b) Hatton*, late Lord Chancel. of England touching Copyholds in *Wellinborough* in *Northamptonshire*: *Nota* Reader, a good Difference between these Cases which consist upon Numbers of Copyholds which may support a Custom, and one single Case of a Copyhold, as in *Murrel's Case* before, in which the Lord doth not grant *tacite* any customary Court, nor the Grantee having but one single Copyhold can't hold Court.

TWO Points were resolv'd by *Wray Chief Justice, Sir Tho. Gawdy, & tot' Cur'*, upon Evidence given to a Jury; that if a Court be held by a Steward of a Manor (c) out of it, and divers Grants and Admittances there made; the Court and all the Grants and Admittances are void, for the Court of the Manor ought to be held within the Manor, and not out of the Jurisdiction of it; which agrees with the Resolution of the fourth Point before, in *Melwiche's Case*. But it was resolv'd, that by (d) Custom the Court may be held out of the Manor, and Grants and Admittances made there good enough, as divers Abbots, Priors, &c. used to hold Courts at one Manor, for divers several Manors, and good by Custom. 2. It was resolv'd, that where a Woman Tenant for Life takes Husband, and the Husband commits Wast against the Custom of the Manor, and dies, the Estate of the Wife is utterly forfeited (e) by the Act of the Husband. But if (f) a Stranger commits the Wast without the Assent of the Husband, it is no Forfeiture; and according to this Resolution it was certify'd into the Chancery by *Mead* and *Periam*, two of the Justices of the *Common Pleas* between the same Parties as to both Points, upon Conference had with divers other Justices.

IT was resolv'd by *Wray Chief Justice, Sir Thomas Gawdy, & tot' Curiam*, upon Evidence to a Jury, That if a Copyholder be seized by Force of several Copies, s. of *Black Acre* by the Rent of 3d. and of *White Acre* by the Rent of 4d. and of *Green Acre*, by the Rent of 6d. and afterwards the Copyholder commits (h) Wast in Part of *Black Acre*, or makes a Feoffment of Part of *Black Acre*, or denies the Rent of that Acre, by that all *Black Acre* is forfeited, (i) but it is no Forfeiture of *White Acre*, nor of *Green Acre*. For altho' they all are in one and the same Hand, yet every Acre is held severally, and to every Acre there is a several Condit. in Law (k) *tacite* annex'd, so as the Forfeiture of the one can't be the Forfeiture of any of the others, for the sev. Condit. in Law follow the sev. Tenures; and therof, the Forfeiture of the one can't be the Forfeiture of any of the others: So it was at the same Time resol.

Jackson in C. P.
(a) Antea 26. b.
Cr. El. 103, 394,
395, 443, 662.
(b) Cr. El. 103,
395, 443, 662.

14.
Mich. 27 & 28 El.
inter Clifton &
Molineux, in B.R.
(c) Antea 26. b.
Ow. 35. 9 Co. 51. b
Cr. El. 103.
1 Roll. 509.
B. N. C. 387.
Br. Court Baron
22. Br. Tenant
per Copy 26.
Co. Lit. 58. a.
(d) Co. Lit. 58. a.
Cr. Car. 367.

(e) 1 Roll. 509.
2 Roll. Rep.
344, 361, 372.
Cr. El. 149.
Cr. Car. 7.
O. Bendl. 83, 119.
Godb. 345.
Palm. 383, 384.
(f) 1 Roll. 508.

15.
Tr' 26 El. in B.R.
inter Taveiner
& Cromwell.
(g) Cr. El. 353.
Co. Ent. 272, ad
288.
(h) 1 Bull. 51.
(i) Cr. El. 353.
(k) Postea 28. a.

That if the said Copyholder of the said three Acres severally held as aforesaid, surrenders them to the Use of *A.* and his Heirs, and the Lord admits *A.* accordingly, (a) *Tenendum per antiqua servitia inde prius debita & de jure consuetata*, or to such Effect; and after *A.* commits a Forfeiture in *Black Acre*, he shall forfeit that only, and none of the others for the said *Tenendum (reddendo singula singulis)* continues the several Tenures; and so it is not material whether the Copyholds be in one or several Copies, but whether the Tenure be one or several, is only material as to this Purpose; and so was it adjudg'd upon Demurrer, *Hill. 35 Eliz. in C. B. inter James Taverner Pl. & Thomas Cromwel Def.* So if divers several Copyholds escheat to the Lord, and he regrants them to another, *Tenend' per antiqua servitia, &c.* they shall be severally held as they were before the Escheat: And in this Case it was resolv'd, That when a Copyholder surrenders to the Use of another, and the Lord admits him, now he who is so admitted is (b) in by him who made the Surrender; and in Plaintiff in Nature of a Writ of *Entry in the Per*, shall be supposed *in the Per* by him who made the Surrender; for the Lord is but an (c) Instrument to make Admittance, and he who is admitted shall not be subject to the Charges or Incumbrances of the Lord: And so *Reader*, where it is said in the *Case of Clifton & Molineux before*, that by the Forfeiture of the Husband all the Estate of the Wife shall be forfeited, it is to be intended all the Copyhold Estate under the same Tenures.

(a) 3 Leon. 109.
Postea 28. a.

(b) Postea 28. b.
29. b. Mo. 358.
Cr. El. 301.
Co. Lit. 59. b.
Bridgm. 51.
1 Roll. 503.
Cr. Car. 205.
(c) Cr. El. 311.
Postea 29. b.
Bridgm. 51.
1 Roll. 503.
8 Co. 63. b.
13 Co. 3.
Moor 112.

16.

Mich. 42 & 43 El.
in B. R. inter
Hubbard &
Hamond.

UPON Evidence to a Jury, these Points were resolv'd
Popham Chief Justice, *Garwody*, *Clench*, and *Fenner*, Jus-
tices of the *King's Bench*.

1. That if the Fines of Copyholders of a Manor upon Admittance, be uncertain, yet the Lord can't demand or exact excessive and (d) unreasonable Fines, and if he does, the Copyholder by the Law may deny to pay them without any Forfeiture; and it shall be determin'd by the Opinion of the Justices, before whom the Matter is depending, either upon Demurrer, or upon Evidence to a Jury upon the Confession or Proof of the yearly Value of the Land, whether the Fine demanded was reasonable or not: For if the Lords might assess excessive Fines at their Pleasures, all the Estates of Copyholders, which are a great Part of the Realm, and which have continu'd from Time whereof &c. would be at the Wills of the Lords defeated and destroy'd, which would be inconvenient. And it was said, that according to this Resolution in this Point, it had been adjudg'd in *C. B. in (e) Hoddesdon's Case*.

(d) Mo. 622, 623.
Cr. El. 351, 779.
Cr. Car. 196.
1 Roll. 507, 523.
2 Roll. 578.
1 Rol. Rep. 33.
11 Co. 44. 4.
13 Co. 3.
3 Brownl. 186.
Treby's Argu-
ment in quo
Warranto 34.
Hob. 135. Co. Lit.
56. b. 59. b. 60. a.
Antea 21. b.
Vide supra 21. b.
Brown's Case.

(e) Cr. El. 351, 779

2. It was resolv'd, if the Lord in Case of Incertainty of Fines, assess a reasonab. Fine, and requires the Copyh. to pay it,
the

the Copyholder is not bound (a) to pay it presently, because he can't tell what Fine the Lord will assess, *Et * Nemo tenetur divinare*; and therefore he can't provide any certain Sum, and therefore he shall have convenient Time to pay it, if the Lord himself appoints no certain Day for Payment of it; But otherwise it is of Fines certain.

3. It was resolved, that where a Copyholder has several Lands severally held by several Services by Copy, there the Lord ought to assess and demand the Fines (b) severally for every Parcel which is so severally held. For the Tenant may refuse (c) to pay the Fine for one Parcel and forfeit that, and pay the Fines for the others; And as it was agreed in *Taverner's Case*, every several Tenure has a several Condition in Law (d) tacite annexed to it; and therefore the Lord ought for every several Tenure to assess and demand a several Fine: So if all the said several Copyholds are surrender'd to the Use of another and his Heirs, and the Lord admits him (e) *Tenendum per antiqua servitia inde prius debita & de jure consuetata*, there, as it was also resolved in *Taverner's Case*, the Tenures are several, and therefore the Fines ought to be severally assessed and demanded.

4. *Popham Chief Justice* said, it was adjudged in *Sandes Case*, that no Fine is due to the Lord either upon Surrender or Descent till Admittance; for the Admittance is the Cause of the Fine, and if after, the Tenant denies to pay the Fine, it is a Forfeiture. And so it was resolved by *Wray* and *Periam Justices* of Assize in Evidence to a Jury in the County of *Suff.* *inter Nicholas Bacon Knight. Pl. & Flatman Def.* for a Copyhold of the Manor of *Wulsham* in the *Willowes* in the County of *Suff.*

THE Case was such; *Alice Westwick* was Copyholder of the Tenements in which, &c. in Fee, held of the Manor of *Peter Leyson* in the County of *Buck.* and 12 *H.* 8 surrender'd the Tenements into the Hands of the Lord of the said Manor to the Use of *W. Westwick* her Son in Fee; and at the next Court held 13 *H.* 8. for the same Manor, the Entry in the Roll was to this Effect; *Ad hanc Curiam venerunt Will' Westwick & Johan' uxor ejus, & ceperunt de Domino Tenementa præd' cum pertinentiis in quibus, &c. præf. W. Westwick & Joh' uxori ejus: Tenend' eisdem W. & J. & hered' suis, &c.* And afterwards *William* died, and *Jo.* survived and surrendered the Tenements to the Use of the Defendants, who entred, upon whom the Plaintiff as Cousin and Heir of *William Westwick* entred, and the Defts. re-entred; And the Pl. brought an Action of Trespass, and all this was found in a special Verdict: And it was argued by the Pl'ts Council, that the Plaintiff ought to have Judgment

(a) Cr. El. 779. Moor 623.
13 Co. 2. Palm. 550.
Lit. Rep. 68.
4 Co. 60. b.

(b) Cr. El. 779. Moor 623.
(c) Cr. Eliz. 779. Moor 623.

(d) Antea 27. a.

(e) Antea 27. b. Leon 109.

Inter Bacon & Flatman.

17.

Tr. 33 Eliz. in B. R. Westwick v. Wyer & Wx.

ment for divers Reasons. 1. When *Alice Westwick* surrender'd her Land to the Lord of the Manor to the Use of *W. W.* by the Surrender the Estate of the Copyholder is in the Lord, which he might grant to any Stranger, as the Feoffees to an Use might at the Common Law; and *W. W.* had no Remedy but in a Court of (a) Equity to compel the Lord to admit him, & *per consequens* when the Lord grants the Land to *W. Westwick* and his Wife in Fee, it is a good Grant to both. 2. *Will Westwick* in the Case at Bar, having but Remedy in Equity to be admitted to the Land, it shall be intended that *W. Westwick* requested the Lord to make a Grant to him and his Wife, for so much is implied in it, when it is said, *Quod ad hanc Curiam venerunt W. Westwick & Johan' uxor ejus, & ceperunt, &c.* and every Admittance of a Copyhold amounts in Law to a Grant, wherefore they conceived that Judgment ought to be given for the Plaintiff. To which it was answered and resolved by the Court, That as to the first Reason the Plaintiff's Council had mistaken the Law. For when *A. W.* surrender'd the Land to the Lord to the Use of *W. W.* the Lord by the Custom (which makes the Law in such Case) had but a customary Power to make Admittance (b) *secundum formam & effectum sursum redditionis*, and therefore it is not to be likened to the Case of Feoffees at the Common Law. And altho' the Lord grants the Land over by Copy to another, all that is without Warrant, for notwithstanding that, the Lord may make Admittance according to the Surrender, and that shall be good, and he who is admitted shall be (c) in by him who made the Surrender, as it was resolved in *Taverner's Case* next before: And therefore it was agreed *per totam Curiam*, if the Lord after such Surrender grants the Land to *Cestuy que use* and a Stranger, the whole shall enure to the *Cestuy que use*; or if he admits *Cestuy que use* upon Condition, the (d) Condition is void, for after Admittance he is in by him who made the Surrender. As if a Man devises a Term to *J. S.* and the Executors agree and assent that *J. S.* and *J. N.* shall have the Term, or that *J. S.* shall have it upon Condition, in these Cases *J. S.* shall have the Term solely and absolutely, for after the Assent of the Executors he is in by the Devise. And it was said, that it has been lately adjudged in *Bunting's Case*, That where a Copyholder surrenders to the Ld. to the Use of another for Life, (e) and the Lord admits him to hold to him and his Heirs, that yet he who is so admitted, has but an Estate for Life, for he is in after the Admittance by Force of the Surrender. As to the second Objection it was answered and resolved, That without special Custom, for (f) *Consuetudo loci est semper observanda*, or other special Matter which is in this Case, the Admittance shall enure (g) only to the Husband for the Reasons aforesaid; wherefore Judgment was given against the Plaintiff.

(a) Cr. Jac. 368.

(b) 8 Co. 135. b.
9 Co. 107. a. Co.
Lit. 59 b.(c) Antea 27. b.
Moor 358. Cr.
Eliz. 361. Co.
Lit. 59. b.
Bridgm. 51.
1 Roll. 503.
Postea 29. b.
Cr. Car. 205.
(d) 1 Roll. Rep.
195.

(e) Postea 29. a. b.

(f) 10 Co. 140. a.
6 Co. 67. a.
7 Co. 5. a.
(g) Lane 99.

THE Cafe as it was found by special Verdict was to this Effect; *J. Bunting* the Pl's. Father, and *Agnes Adingfal* contracted Matrimony between them *per verba de presenti tempore*; and afterwards 1 Decemb' anno Dom' 1555. the said *Agnes* took to Husband *Thomas Twede*, and afterwards 9 Julii, 1555, *John Bunting* libelled against the said *Agnes* upon the said Contract in the Court of Audience, upon the Proceeding in which Libel, *Decretum fuit quod præd' Agnes subiret matrimonium cum præfato Johanne Bunting, & insuper pronunciatum, decretum & declaratum fuit dictum matrimonium fore nullum, &c.* And further it was adjudged, that the said *John* and *Agnes* should entermarry, which they did, and had Issue the Plaintiff, the said *T. Twede* then living, and afterwards *John Bunting* died; and it was further found, that one *Richard Bunting* Father of the said *John* was a Copyholder in Fee of the Land in which, &c. held of the Manor of *Goldingtons* in *Ganiscolln* in *Essex*, and out of Court according to the Custom of the Manor surrender'd by the Hands of the customary Tenants to the Lord of the Manor to the Use of *Margaret* his Wife and *Robert* his younger Son, and died, after whose Death the said Surrender was presented according to the Custom, and thereupon the Lord of the Manor gave Admittance, and granted Seisin of the Land to *Margaret* and *Robert*, and to the Heirs of *Robert*; and *Margaret* died, and *Robert* survived, and surrender'd the Land to the Use of *Emme* his Wife, and died, *Emme* was admitted, *Charles Bunting* as Cousin and Heir of the said *Rich. Bunting*, s. Son and Heir of *John*, Son and Heir of the said *Richard* entred upon *Emme*, and the Def. as her Servant, and by her Command re-enter'd, upon which Re-entry the Pl. brought the Action: And in this Case 5 Points were adjudg'd. 1. That altho' *Twede* then being *de facto* the Husband of the said *Agnes* was not party to the said Suit, nor to the Sentence in the *Spiritual Court* which dissolved the Marriage betwixt him and the said *Agnes*, but the said *Agnes* (a) only; yet the Sentence against the Wife only being but declaratory, was good, and shou'd bind the Husband *de facto*, and for as much as the Conusance of the Right of (b) Marriage belongs to the Ecclesiastical Court, and the same Court has given Sentence in this Case, the Judges of our Law ought (altho' it be against the Reason of our Law) to give Faith (c) 2 Ventr. 43. 5 Co. 7. a. and (c) Credit to their Proceedings and Sentences, and to think that their Proceedings are consonant to the Law of holy Church, for (d) *cuiuslibet in sua arte perito est credendum*, and so have the Judges of our Law always done, as appears in (d) 5 Co. 7. a. Cawdrie's Cafe. Cawly 31. 7 Co. 42. b. Calvin's Cafe. 7 Co. 19. a. Co. Ljc. 125. a. (e) 34 H. 6. 14. b. 11 H. 7. 9. a. b. 8 Aff. pl. So that it was resolv'd, that the Pl. was (f) legitimate, and no Bastard. (e) 7 Co. 43. b. Moor 169. (f) Moor 169. 171.

2. When *R. Bunting* Copyholder surrender'd into the Hands of the Ld. to the Use of the said *Marg. and Rob.* without Li-

18.

M. 27 & 28 EL.
inter Bunting
v. Lepingwel.
Moor 169, 170,
171. 2 Inst. 684.

(a) Moor 169.

(b) Cart. 233.

(c) 2 Ventr. 43.

5 Co. 7. a.

Cawdrie's Cafe.

Cawly 31. 7 Co.

42. b.

(d) 5 Co. 7. a.

Cawdrie's Cafe.

Cawly 31.

7 Co. 19. a.

Calvin's Cafe.

Co. Ljc. 125. a.

(e) 7 Co. 43. b.

Moor 169.

(f) Moor 169.

171.

(a) Co. Lit. 59. b. mitation of any (a) Estate, it was resolved, that they had but an Estate for Lives, for as well Estates as Descents shall be directed by the Rules of the Law, as necessary Consequents upon the Custom, unless there is a special Custom (which is always to be observ'd) within the Manor; as these Words, *sibi & suis*, or *sibi & assignatis*, or such like may by Custom create an Estate of Inheritance. And it was observed that the Estates in these Cases limited upon Surrenders, are always annexed to Estates of him to whose Use the Surrender is made, and always the Surrender to the

(b) Co. Lit. 59. b. Lord is general (b) without Limitation of any Estate.

3. It was resolved, That when the Lord made Admittance and deliver'd Seisin to *Margaret and Robert*, and to the Heirs of *Robert*, it was only an (c) Admittance to them for the Term of their Lives, the Reversion over to *Rich. Bunting* who made the Surrender, because the Lord is but an Instrument (d) in this Case, and when he has admitted according to the Effect of the Surrender, nothing remains in him but the Reversion of the Estate in him who made the Surrender to dispose of as he pleases according to the Custom of the Manor; and those who were admitted for their Lives, were in (e) by him who made the Surrender, which can't be if the Reversion shall be in the Lord.

(c) Antea 28. b.
Co. Lit. 59. b.
8 Co. 135. b.
9 Co. 107. a.
Cr. Eliz. 392.
Cr. Car. 205.
1 Rolls 504.
(d) Cr. El. 261.
Cr. Car. 205.
Antea 27. b.
Bridgman 51.
1 Rolls 503.
8 Co. 65. b.
Moor 112.
13 Co. 3.
2 Sidert. 61.
(e) Antea 27. b.
28. b. Moor 358.
Cr. Eliz. 361.
Co. Lit. 59. b.
Bridgman 51.
1 Rolls 503, Cr.
Car. 205.

4. Altho' he who is admitted is in by him who made the Surrender, yet it was resolved that a Man may surrender (as *Robert Bunting* did in this Case) to the Use of his Wife, because the Husband doth not make it immediately to the Wife but by two Means, *f.* by Surrender of the Husband to the Lord to the Use of the Wife, and by Admittance of the Lord to the Wife according to the Surrender.

5. When *Rich. Bunting* made the Surrender out of Court, (f) and died before it was presented in Court, yet the Surrender being presented after his Death, according to the Custom is good, but if it had not been presented according to the Custom, then the Surrender became of no Force or Effect. So if the (g) Tenants by whose Hands the Surrender was made die, yet if it is upon good Proof presented, it is good enough. So in the Case of (h) *Kite* and *Queinton* before, where he to whose Use the Surrender was made died before Admittance, yet his Heirs shall be admitted. And this last Point was resolved without any Difficulty or Scruple, and that was the true Case of *Bunting* mentioned in (i) *Westwick's* Case next before, and well agrees with the Reason of the same Case.

(f) Cr. Jac. 403.
1 Rolls 100, 501.
Co. Lit. 59. b.
3 Bulstr. 215.
1 Roll. Rep. 415.
Bridgman 51.
Lane 99. 2 Syd.
372, 38, 61, 62.
1 Rolls 504.
2 Sand. 422.
1 Mod. Rep. 102.
(g) 3 Bulstr. 215.
Bridgman 51.

(h) 1 Rolls 504.
Antea 25. a.
(i) Antea 28. b.

THE (k) Case was, within the Manor of *Chaldwarton* in the County of *South.* there were divers customary Lands and Tenements, and which by Custom of the Manor from Time whereof, &c. had been granted by Copy of Court Roll of the same Manor, for one, two, or three Lives;

19.
P. 26. El. Down
v. Hopkins in
R. R.
(k) Cr. Eliz.
323.

of which Manor Sir *George Pawlet* and *Elizabeth* his Wife, as in the Right of his Wife were seised, &c. and at a Court of the said Manor, 4 & 5 *Phil. & Mar.* granted the Place where, &c. being Parcel of the customary Tenements, &c. to the said *Down durante viduitate sua*; and if this Grant was according to the Custom of the Manor or not was the Question: And it was adjudg'd that this Grant was within the Custom, for every Grant (a) *durante viduitate* is an Estate for Life, as appears by *Lit. 90. & 37 H. 6. 27. 14. H. 8. 13. a.* &c. but every Grant for Life is not *durante viduitate*, for a general Estate for Life is larger and more beneficial than *durante viduitate*. In *Mich. 2 & 3 Eliz. Dyer 192.* Issue was taken, whether the Custom of a Manor was, that the Wife of every Copyholder shou'd have the Land after the Death of her Husband for the Term of her Life; and it was given in Evidence that the Custom was, that she should have

(b) *durante viduitate sua*, and it was adjudg'd, that this Evidence did not maintain the Custom alledged before, because it is a less Estate than Custom *pro termino vite* was, and the Effect and Substance of Issues joined betwixt the Parties are to be proved precisely: But in the principal Case it was resolv'd, that the Custom is well pursued, because the Estate granted was less (c) than the Custom warranted; And that agrees with the Resolution before of the second Point in *Gravenor's Case*. And in this Case it was said, that the Lord of a Manor may by (d) Word retain one to be Steward of his Manor, and to hold the Courts thereof, as well as a (e) *Bailly* may be, and that by Word, and this Retainer shall serve till he is discharged, and therewith agrees 8 *Eliz. Dyer 248.*

IN this Case 3 Points were resolv'd. 1. That the Ld. of a Manor may retain one to be Steward of his Manor, and to keep his Courts by (g) Word, and this Retainer shall endure till he is discharged thereof, and this agrees with the Opinion in Case next before.

2. That where a Copyholder of the Queen's Manor was attained of Felony, by which his Copyhold escheated, the Queen's Steward of the same Manor might (h) grant it over *ex officio* without any special Warrant; for the Custom of the Manor warrants the Steward of the Manor for the Time being to grant it, and the Custom binds the Q. her Heirs and Successors: But altho' he may by the Law do it, yet his Duty is before he makes any Grant to inform the Lord Treasurer of *England*, Chancellor and Barons of the Exchequer or some of them, for his better Direction, and for the Queen's greater Profit in those Cases.

3. It was resolv'd, That the *K's Auditor* (i) or Receiver has

(a) *Lit. Sect. 385. Co Lit. 42. a. 234. b. 37 H. 6. 26. Fitz. brief. 136. Br. Waite 102. Br. general brief 11. 4 Co. 3. a. Dyer 305. pl. 59. Moor 31.*

(b) *Dyer 192. pl. 23. Cr. Eliz. 415. Doct. pla. 200.*

(c) *4 Co. 23. a. 1 Rols 511. Co. Lit. 52. b. Cr. Eliz. 323. 373. Godb. 20. 4 Leon 64. 1 Rols Rep. 48. 1 Leon 56. Salk. 219.*

(d) *Co. Lit. 61. b. Kelw. 158. b. Cr. Jac. 520. 527. 1 Leon. 227. 228. Godb. 142. Dyer 248. pl. 79. infra 30. a. (e) Kelw. 174. pl. 2. 7 H. 7. 10. a.*

20. Tr. 41 *Eliz. Harrys and Jay.* (f) in *B. R. on a. special Verdict* Cr. *Eliz. 699. a.* (g) *Dyer 248. pl. 79. Kelw. 158. b. Co. Lit. 61. b. Cr. Jac. 526. 527. Godb. 142. 1 Leon. 227. 228.* (h) *Cr. El. 699.*

(i) *Cr. El. 699. not*

not Power to retain a Steward to hold the Queen's Courts: But he ought (if such voluntary Grants by him made upon Escheats or Forfeitures shall be good) to have Letters Patents of the Office of the Stewardship of the same Manor.

21.

Lady Holcroft's Case.

- (a) Antea 30.
- Co. Lit. 61. b.
- Kelw. 158. b.
- Cr. Jac. 526.
- 527. 1 Leon. 227.
- 228. Godb. 142.
- Dyer 248. pl. 79.
- (b) 1 Leon. 227.
- Godb. 142. Cro.
- Jac. 526, 527.
- 1 Ro. 500. Co.
- Lit. 59. a.
- (c) Co. Lit. 61. b.

22.

Trin. 37 Eliz. Shaw & Thompson.

- (d) Moor 410, 411. Cr. Eliz. 426. 1 Rolls 600, 601.
- (e) 2 Siderf. 139. 2 Bullf. 337.
- Hob. 215.
- Antea 22. a. Co. Lit. 33. a.
- (f) 1 Rolls 600. Co. Lit. 32. b.
- Cr. Car. 43.
- 2 Inst. 80. Moor 411.
- (g) Cr. El. 426. Nov 129.
- (h) Antea 22. a.
- (i) Antea 22. b.

- (k) Moor 410, 411. 1 Rolls 600, 601.

- (l) 1 Rolls 600, 601. 13 Rich. 2 Faux Judgment 7. Antea 21. b. Lit. Sect. 77. Co. Lit. 60. b. Vide 13 R. 2. cited before in Brown's Case, & 14 H. 4. Vide 7 E. 4. 29.

23.

- P. 37 El. Hoe & Taylor in error in B. R.
- (a) Cr. El. 413.
- Moor 355.
- Godb. 174.
- 13 Co. 69.

AND it was said in this Case, That it was adjudged in *C. B.* in the *Lady Julian Holcroft's Case*, that where one was generally retained by the Lord of a Manor by (a) Word to be Steward of his Manor, and to keep his Courts, that such Steward might take (b) Surrenders of customary Tenements out of the Court; for till such Steward is (c) discharged, he is Steward of the Manor, as well by the Retainer by Word, as if he had a Grant thereof by Deed.

THE Case was, That the Pl. late the Wife of a Copyholder in Fee of a Manor in which by special Custom Women were to be endowed, recovered Dower by Plaintiff in the Court of the Manor, and because her Husband died seised, she recovered 50 *l.* Damages for the Profits from the Death of her Husband: The Woman brought an Action of Debt for this 50 *l.* in *B. R.* And in this Case, 1. It was resolved, That the Wife shou'd not have Dower (e) of a Copyhold, unless it be by special Custom. 2. When a Wife is to be endowed by Custom of a Copyhold, then she shall have all Incidents to Dower, and therefore in such Case she shall recover Damages by the Statute of (f) *Merton, cap. 1. de viduis, &c.* and therefore in the Case at Bar the Recovery of Damages was lawful; and altho' they exceed (g) 40 *s.* yet they were well warranted by Law: which two Points well agree with the Resolution before in (i) *Brown and River's Case*. 3. It was resolved, That no Action of Debt lies for the said Damages at Common Law, for upon such Judgment no Writ of Error (k) or false Judgment lies, but the (l) Remedy is in the Court of the Manor, or in the *Chancery*, which is also consonant to the Resolution in *Brown's Case*. And *Fenner Justice* said, That he had seen a Record of 36 *H. 8.* where the Lord upon a Petition to him, had for certain Errors in the Proceedings reversed such Judgment given in his own Court; And upon that, the Defendant shall have *Audita querela* to be restored to the Damages recovered against him.

THE said Writ of Error was brought upon a Judgment given in *C. B.* where the Case was such; *Henry Ferringham Esq;* was Lord of the Manor of *Mutford* in the County of *Suff.* and *Taylor* claimed the Underwood of a great Wood called *Mutford-Wood*, Parcel of the same Manor to be demised, and demisable from Time whereof, &c. by Copy of Court Roll of the same Manor, &c. to be cut yearly

by four (a) or five Acres at the most, and conveyed to himself a Grant of the said Underwood by Copy, &c. according to the Custom; and for Trespass done in the Underwood, he brought the Action of Trespass against *Hoc*, And it was adjudged in *C. B.* that Underwood growing upon Parcel of the Manor might by Custom be granted by Copy of Court Roll of the same Manor; And that Judgment was affirmed in *B. R.* for it was there said, That the said (b) Underwood might be granted by Copy, because it grew upon Parcel of the Manor; also it is a Thing of Perpetuity to which Custom may extend, for after every felling, the Underwood grows again, *ex stirpibus*. So it was resolved, that (c) Herbage, or any (d) Profit of any Parcel of the Manor, might by Custom be granted by Copy: And it was said that a (e) Fair appendant to the Manor of *Crokenhorn* in the County of *Somerset* is granted by Copy of the same Manor. And that well explaineth the Resolution in *Murrel's Case* before, concerning the first of the Pillars upon which every Copyhold stands, *s. Custom.* *The 10 Case of these.*

(a) Cr. Eliz. 413. Moor 355.

(b) Jenk. Cent. 274. Cr. El. 413. Moor 355. Co. Lit. 58. b.

(c) Co. Lit. 58. b. 1 Rolls 498. Jenk. Cent. 274.

(d) Jenk. Cent. 274.

(e) Antea 24. b. Jenk. Cent. 274. Cr. El. 413. Moor 355. Co. Lit. 58. b.

IT was adjudg'd that if a Copyhold Estate is forfeited to the Lord, or escheats, or otherwise comes to the Lord's Hands, if the Lord makes a Lease for Years, or for Life, or other Estate by Deed, or without Deed, that this Land can never after be (f) regranted by Copy, for the Custom is destroyed, because during such Estates, the Land was not demised nor demisable by Copy of Court Roll: So if the Lord makes a Feoffment in Fee thereof upon Condition, and afterwards enters for the Condition broke, yet it can never be regranted by Copy; But if the Lord keeps the Land in his Hands for a long Time, or lets it at Will, he, his Heirs or Assigns may well regrant it at his Pleasure. So if the Interruption is wrongful, as if the Lord is disseised, and the Disseisor dies seised, or if the Land is recovered against the Lord by false Verdict, or erroneous Judgment, in these Cases, till the Land is recovered, or the Judgment reversed by the Lord of the Manor, the Land was not demised, or demisable, and yet after the Land is recontinued, it is grantable again by Copy; for *Non valet (g) impedimentum quod de jure non sortitur effectum, & quod contra legem fit pro infecto habetur*: But if the Land so forfeited, or escheated before any new Grant made is extended upon a Statute, or Recognisance acknowledged by the Lord, or if the Wife of the Lord in a Writ of Dower has this Land assigned to her, altho' these Impediments are by Acts in Law, yet in as much as the Interruptions are lawful, the Lands can never after be granted by Copy. If a Copyholder accepts (h) a Lease for Years of the Lord of his Copyhold, the Copyhold

24.

M. 18 & 19 El. in B. R. Frenche's Case.

(f) 1 Rolls 498. 2 Syderf. 35, 140. 142. 1 Jones 449. Dyer 114. pl. 61. Cr. Car. 521.

(g) Co. Lit. 381. b.

(h) 2 Co. 17. 2. 1 Rolls 510. Godb. 101. Sav. 70. 71. 1 Brown. 32. 1 Anderf. 191. 1 Leon. 170.

(a) Sav. 70, 71.
3 Bullst. 81.
Godb. 34. Cr.
Eliz. 7. Cr. Jac.
84. Godb. 153.
Noy 12. Moor
185. 2 Syderf.
139. Cr. Car. 521.
(b) Moor 185.
2 Co. 17. a.

(c) 2 Syderf.
142. Co. Lit.
18 b.

25.

M. 29 & 30 El.
Foufion & Crach-
code in B. R.

(a) 6 Co. 60. b.
Hob. 86. Cr.
Jac. 665. Cr.
Eliz. 353.
(b) Doct. pla.
St. Moor 461.
Hob. 86. Cr.
Jac. 665. Cr.
Eliz. 353, 390.
6 Co. 60. b.
Kelw. 77. a.

(c) Doct. pla.
St. Cr. Eliz.
390. Moor 461.
6 Co. 60. b.
Cr. Jac. 665.

Hob. 286.

Copyhold is destroyed for ever, and can never be granted again: If the Copyholder (a) takes a Lease for Years of the Manor, by that his Copyhold has not Continuance, as it was adjudged *Pasch. 17 Eliz. in (b) Hide's Case*; but in the same Case it was resolved, That such Lessee might regrant the Copyhold again to whom he wou'd, for the Land was always demised or demisable; And if a Copyhold is surrendered to the Lessor of the Manor, or is forfeited to him, he or his Executors or Assigns may well regrant it: And if a Copyhold escheats to the Lord, and he aliens the Manor by Fine, Feoffment, or otherwise, his Alienee may regrant the Land by Copy, for it was always demised or demisable: And by these Resolutions you will better understand the general Learning in *Murrel's Case before*, concerning the second of the Pillars of a Copyhold, *s. (c)* demised and demisable from Time whereof, &c.

THE Case was, that a Copyholder of certain Tenements called *Collins Parcel* of the Manor, &c. in Pleading alledged *Quod infra Maner' præd' talis habetur, necnon a toto tempore cujus contrarii memoria hominum non existit, habebatur consuetudo, (viz.) quod quilibet tenentes præd' tenementorum vocat' Collins, had used to have Common in such a Place Parcel of the said Manor; And if the Custom might be alledged within the Manor and applied but to one single Copyhold was demurr'd in Law. And it was adjudged, that such (a) Custom, as well for the Form as for the Matter of it, was good: For first, the Copyholder in his own Name can't (b) prescribe, for the Weakness and Baseness of his Estate; but if he will prescribe, he ought to prescribe in the Name of the Lord of the Manor, *s.* to say, That the Lord of the Manor and all his Ancestors, and all those whose Estate he has, have had Common in such a Place for him and his Tenants at Will, &c. as appears in 22 *H. 6. 51. a. &c.* and that shall serve when the Copyholder claims Common or other Profit in the Soil of a Stranger: But when the Copyholder claims Common or other Profit in the Lord's Soil, then he can't (c) prescribe in the Name of the Lord; For the Lord can't prescribe to have Common or other Profit in his own Soil; but then the Copyholder, so far as he can't prescribe, neither in his own Name, nor in the Lord's Name, he must of Necessity alledge, that within the Manor is such a Custom as in the Case at Bar: And as when the Copyholder claims Common or other Profit in the Soil of the Lord, he ought to claim it by Custom of the Manor; so when he claims it in the Land of ano. which is not Parcel of the Manor, he can't claim it by the Custom of the Manor, for the Custom is, *Quod infra maner' talis habetur, &c. consuetudo*, and theref. he can't apply*

apply it, or by Force thereof claim any Thing out of the Manor, as was done 21 *Eliz.* (a) *Dyer*, and therefore there it was clearly mispleaded; but in such Case he ought to prescribe in the Name of the Lord.

Nota, a good (b) Difference between Prescription which is Personal, and is always made in the Name of a Person certain and his Ancestors, or those whose Estate he has, and Custom which is local and alledged in no Person, but that within a Manor, &c. is such Custom, and that serves for them who can't prescribe in their own Name, nor in the Name of any Person certain, as Inhabitants of a Town, &c. as appears in 15 *E.* 4. 29. 40 *Aff.* 41. 2 *Mar. Br. Prescription* 100. 6 *E.* 6. *Dyer* 71. Also Allegation of a Custom shall serve when it is referred to a Thing insensible, *s.* that all such Lands &c. are devisable, or the like. *Vide* 40 *Aff.* 41. &c. And because in the Case at Bar the Custom might have a lawful Beginning, *s.* That one Copyholder only should have Common, or Estovers, or other Profit in the Land of the Lord, and that in many Manors, some Copyholders had Common in one Wast of the Manor, and others in another severally, so that the Custom cannot be applied to all; And because all the other Copyholders may be determined or extinct; for these Reasons 'twas adjudg'd that the Custom was well alledged in the Case at Bar, as well for the Manner as for the Matter; And such Custom for one Copyholder to have Common of Estovers in the Lord's Wood, Parcel of the Manor whereof the Copyhold was held, was adjudged to be good. *Pasch.* 10 *Eliz.* as it was said in this Case. *Vide* 21 *E.* 3. 34. 1 *Mar. Dyer* 114. 5 *E.* 6. *Dyer* 70, 71. And because it has been often said before, That the Custom of the Manor is the Soul and Life of the Copyholders, it was necessary in my Opinion to add this Case, to shew how he shall alledge the Custom, and when and how he shall prescribe.

Pasch.

Pasch. 26 Regina ELIZABETHÆ.

MITTON'S *Case.*

QUEEN *Elizabeth* by her Letters Patents under the Great Seal constituted and granted the Office of Clerk of the County Court, or Shire-Clerk of the County of *Somerset* to *Mitton*, with all Fees, &c. for Term of his Life: And afterw. the Q. constituted *Arthur Hopton*, Esq; Sheriff of the same County, who interrupted *Mitton*, claiming that which was mention'd to be granted to *Mitton* to be incident to his Office of Sheriff, and thereupon he appointed a Clerk himself of the County Court: *Mitton* thereupon complained to the Lords of the Council, who referred the Consideration of the Validity of the Grant of the said Office to the two C. Justices *Wray* & *Anderson*, before whom the Matter was often debated; And *Mitton's* Council argued, that the Grant of the said Office was good in Law for divers Reasons. 1. Because the County Court is the Q's. Court, and in it as to all Actions and Proceedings by *Justices*, or other Writ, or by Plaintiff, the Suitors are Judges, and the Sheriff but Minister, and as to *Utlagaries*, the (a) Coroners are Judges; and in Proof thereof 6 E. 4. 3. b. 7 E. 4. 23. a. 39 H. 6. 5. a. 26 Ass. 45. were cited, and therefore it was concluded, that the Queen might in her own Court appoint a County Clerk to enter the Judgments and Proceedings in the same Court. 2. That *Arthur Hopton* (who was made Sheriff after the Patent) could not avoid it, and principally for as much as the Sheriff has his Office but at the Will of the Queen, which Office she might at her Pleasure determine in Part or in all, and the Queen has granted the said Office of Shire Clerk to *Mitton* for Term of his Life, and therefore the said Sheriff should not avoid it. 3. *Mitton's* Council shewed 2 or 3 (b) *Precedents*, by which it appear'd that such

(a) 9 Co. 119. a.
Co. Lit. 288. b.
Cr. El. 50.

(b) Hard. 98.

Such Offices had been granted in the Time of King H. 8. and after; and that was the Substance of all which was said for the Maintenance of all the said Letters Patents: And after many Arguments (because the Case concern'd the Validity of the Queen's Grant) the two Chief Justices had Conference with the other Justices, and upon Consideration had of the Letters Patents, and of all that was said in Maintenance of them, it was resolv'd by all the Justices *nullo contradicente aut reluctantate*, That the said Letters Patents were void in Law; and the Reasons and Causes of their Resolution were. 1. That the Office of (a) a Sheriff is an ancient Office which has had Continuance long before the Conquest, and is an Office of great Trust and Authority; for the King commits to him * *custodiam Comitatus*, the Custody and Guard of the County; And when the King appoints a Sheriff *durante bene placito*, altho' he may determine his Office (b) at his Pleasure, yet he can't determine it in (c) Part, as in one Town, or Hundred, or any other Parr, nor abridge the Sheriff of any Thing incident, or appurtenant to his Office, for the Office is intire, and so ought to continue in its Intierty without any Fraction or Diminution, unless it be by Act of Parliament, or that the King makes some Town &c. a County of itself, and appoints a Sheriff and all Things incident to a Sheriff within the same Town; but can't determine the Office of Sheriff, or any Part without making a new Sheriff, *s.* for the Execution and Administration of Justice. And it was resolv'd, that the County Court, and the entering of all the Proceedings in it are incident to the Office of (d) Sheriff, and therefore can't by Letters Patents be divided from it: And altho' the said Grant has been made to *Milton* when the Office of Sheriff was void, yet it had been void, and when the Queen has appointed a Sheriff, he shall avoid it. And so it was said it was adjudged in *Scrogge's Case* in the Beginning of the Reign of Queen *Elizabeth* where the Case was; That *tempore vacationis* of the Office of Chief Justice of the *Common Pleas*, Queen *Mary* granted (e) the Office of the Exigenter of *London* to *Scrogges*, and it was held void, because it was incident to the Office of Chief Justice of the *Common Pleas*, which the Queen could not have, and the next *C. J.* shall avoid it. And as to the first Objection it was answer'd, That in all Writs directed to Sheriffs concerning the County Court, the King saith, *In Comitatu tuo*; And in all Returns of Exigents made by him he saith, *ad Comitatum meum tentum*, &c. And the Stile of the Court proves it also: And by the Statute of 33 H. 8. cap. 13. it is provided by the K. the Lords Spiritual and Temporal, and the Commons in *Parl. assembled*, That the Sheriff of the County of *Denbigh*, shall keep

(a) Davis 60.
Co. Lit. 168. a.
Pref. 3 Rep.
p. 4. 5.

* 9 Co. 49. Co.
Lit. 168. a. Dalt.
Sher. 5. 6.

(b) Kelt. 47.
pl. 3. Dalt.
Sher. 6.

(d) 2 Rolls 74.
75. 2 Infr. 425.
2 Ventr. 269.
2 Syd. 140.

Vide this Case
Dyer 2 Eliz. 175.

(e) 2 Ventr. 269.
1 And. 152, 153.
&c. pl. 255, 26.
Noy 51.

his Shire Court at the Shire Hall in the said County, &c. by which (as by many other Parliaments) it appears, that the County or Shire Court is the Court of the Sheriff, and altho' the Suitors be there Judges in some Cases, yet *non sequitur* that the Court doth not belong to the Sheriff, for in a Court Baron (a) the Suitors are Judges, and yet the Court belongs to the Lord of the Manor. As to the second Objection that is answered before, because the County Court is incident to the Office of Sheriff, as the (b) Sheriffs turn is. As to 3 Objection it was answered, *Quod (c) judicandum est legibus, non exemplis*. But for a general Answer to all the said Objections, and all others which may be made, it was said, that great Inconvenience would ensue to Sheriffs, who are great and ancient Officers and Ministers of Justice, if such Grants shou'd be of Validity, for by such, as well the entering of all Proceedings in the same Court, as the Custody of the Entries and Rolls thereof do belong to the Office of Sheriff, and that is well proved by the Writ of (d) *False Judgment*, of an erroneoſus Judgment given in the County Court, the Form of which Writs is such; *Jacobus, &c. Vic' S. salutem, si A. fecerit &c. tunc in pleno Com' tuo recordari facias loquelam*, which is, *in eodem Comitatu per breve nostrum de recto, inter A. penitentem, &c. unde idem A. queritur falsum sibi factum fuisse judicium in eodem Com' & record' illud habeas coram Justiciariis nostris apud Westm' &c. sub sigillo tuo, & per quatuor legales milites ejusdem Com' ex illis qui Recordo illo interfuer', &c.* And this also appears by the Precept of a Tolt which the Sheriff makes to remove a Plea in any Court Baron before him in his County, the Words of the Precept are, *Et loquelam, &c. tollas, & sumoneas, &c. predict. J. quod sit ad Comitatum meum S. scil. die Lune, &c. tenend'*. And in all Writs to remove any Plea out of the County into the *Common Pleas*, the King calls the County Court the (e) Sheriff's Court; And if the Sheriffs do not certify by Force of such Writs the Record, then at last shall issue Process of Contempt: And if the Record be imbezilled, the Sheriff shall answer for it, and therefore it wou'd be full of Danger and Damage to Sheriffs, if others shou'd be appointed to keep the Entries and Rolls of the County Court, and yet the Sheriff (f) should answer for them as immediate Officer to the Court, and therefore the Sheriff shall appoint Clerks under him in his Country Court, for whom he shall answer at his Peril; the same Law of the (g) Sheriff's Turn: And Law and Reason require, that the Sheriff who is a publick Officer and Minister of Justice, and who has an Office of such Eminency, Confidence, Peril and Charge, ought to have all Rights appertaining to his Office, and ought to be favoured in Law bef. any private Perf. for his singular

(a) Antea 26. b.
Co. Lit. 58. a.
6 Co. 11. b.
8 Co. 60. b.
9 Co. 48. b. 49. a.
Godb. 49.
1 Rolls 543. Cr.
El. 792. Cr. Jac.
582. 4 Inst. 266.
268. 7 E. 4. 23. a.
21 E. 4. 66. b.
1 Mod. Rep. 17.
12 H. 7. 16. 17.
Br. Judges 18.
Br. Court Baron 9. B. N. C. 116.
(b) 1 Rolls 542.
(c) Cro. Arg. 75. 12 Co. 122.
130. Hard. 122.
(d) F. N. B. 18. b.
Dyer 164. pl. 58.

(e) 6 Co. 11. b.

(f) Cawly 184.
(g) 6 H. 7. 2. b.
3. 2

gular Benefit and Avail. *Mich. 39 & 40 Eliz.* at *Serjeant's Inn* in *Fleetstreet* it was resolv'd by *Popham* and *Anderson* Chief Justices, and all the Justices of *England*, That the Custody of the (a) Goals of the Counties, of Right belongs (a) *Mich. 39 & 40 Eliz. Case of Gaolers. 2 Roll. 75. 3 Co. 44. 2.* and is annexed and incident by the Law to the Office of Sheriffs, and that well appears by the Judgment in *Parl. anno 14 E. 3. cap. 10.* by which it is ordained and enacted, *3 Inst. 92. 1 And. 345, 346. Raym. 423, 468.* That all Goals of Counties shall be rejoined to Sheriffs, and the Sheriffs shall have the Custody of the same Goals, as before Time they were wont to have; and that they shall put in such Keepers for whom they will answer. Upon which it was resolv'd by all the Justices, that the Grants of the Custodies of the Goals of Counties, (now lately, either by King *H. 8.* or after granted to sundry Persons) were utterly void: And forasmuch as the Custody of them belongs to the Office of Sheriff, who being immediate Officer to the King's Courts shall answer for Escapes, and shall be subject to Amercements if he has not the Body in Court upon Process directed to him, &c. it is Reason that he shall put in such Keepers of the said Goals for whom he will answer, according to the Purview of the said Act of *14 E. 3.* and therefore it wou'd be against all Reason, that he shou'd answer for Escapes out of the said Goals, and that he shou'd be subject to Amercements for not having the Bodies of Prisoners, &c. and yet another shou'd have the Keeping and Custody of the Goal: Which Resolution agrees in Reason with the said Resolution in *Mitton's Case*, and therefore I have added it in this Place.

Michaelis 26 & 27 Eliz. Regina, In the King's-Bench.

BOZOUN'S Case.

Godb. 35, 36,
37. 2 Roll. 152,
193.

THE Case between *Fulter* Plaintiff, and *Bozoun* and others Defendants, as it was found by Special Verdict was such; A Portion of Tithes in *Longham*, in the County of *Norfolk*, appertaining to the Rectory of *Gresenhall*, which was a Rectory presentable, and all the other Tithes in *Longham* were Parcel of the Rectory of *Longham*, which was appropriated to the late Monastery of *Wendling* within the same County; of which Rectory of *Longham* Queen *Elizabeth* was seised in her Demesnes as of Fee in Right of her Crown; And by her Letters Patents bearing Date 26 *Januarii* anno 12 *Eliz. Ex gratia speciali, certa scientia, & mero motu* granted to *Nicasius Tertefworth* and *Bartholomew Brookesby* and to their Heirs, *Totam illam portionem decimarum & garbarum suarum in Longham in Com' Norf. cum omnibus aliis decimis suis quibuscunque in Longham in dicto Com' Norf. tunc vel nuper in occupatione Johannis Corbet;* and further granted by the said Letters Patents, that they shou'd be of Force and Effect against the Queen, her Heirs and Successors, *Non obstante male nominando, vel male recitando præd' portionem decimar' & aliorum præmissor'; Et non obstante aliquibus aliis defectis in non nominando, vel male recitando, vel non nominando alicujus tenentis sive occupatoris.* And it was further found by the Jurors, That the said *John Corbet* never had any Tithes in *Longham* in his Occupation; And if all the Tithes in *Longham* Parcel of the said Rectory of *Longham* should pass by the said Letters Patents or not was the Question: In this Case 4 Quest. were moved; 1. Whether the last Words, *s. in the Occupation of J. C.* shou'd refer to the first Words, *s. tot' ill' portion' decimar' & garbar' suarum*

suarum in Longham in dicto Com' Norf. or only to the latter Words, *s. cum omnibus aliis decimis &c.* 2. When the Queen granted *totam illam portionem decimarum & garbarum in Longham*, if the Tithes which were Parcel of the Rectory of *Longham* shou'd pass. 3. If the said first Words, *totam illam portionem decimarum*, were so certain, that the last Words being false, shou'd not make the Grant, but the superfluous Words void. 4. If the *Non obstante* shall supply the Defect of the mistaking of the Farmer. As to the first it was resolv'd by Sir *Christopher Wray* Chief Justice, Sir *Thomas Gawdy* & *totam Curiam*, that the last Words refer to the whole Sentence: 1. Because the Words are, *totam illam portionem decimarum & garbarum suarum &c.* so that this Pronoun (*illam*) shews plainly that there ought to be Words subsequent to explain and reduce into (a) Certainty what Portion by the Queen's Intent shall be granted, *s.* that which was in the Occupation of *John Corbet*, and therefore this Pronoun (*illam*) is not satisfied till it's come to the full End of the Sentence. 2. This Conjunction, *cum omnibus aliis decimis suis, &c.* couples the latter Words to the former, and makes the Words subsequent refer to the whole Sentence. 3. If the first Words wou'd convey all the Tithes of the said Rectory, then the Addition of the Occupation of *John Corbet* to the subsequent Words wou'd be vain and nugatory; *Et* (b) *maledicta expositio est qua corrumpit textum.* As to the second Question, it was resolv'd, that this Word (c) (*portio*) properly signifies a Part or Portion in gross and divided, and not Parcel of the Rectory of *Longham*, and in the Case at Bar the Queen had not any Portion of Tithes in gross, but all were Parcel of the Rectory: And altho' the Queen's Grant is, *Ex gratia speciali, certa scientia, & mero motu*, yet that will not extend the Queen's Grant against her Intent and Meaning expressed in her Grant, nor by any strained Construction make any Thing pass against the apt and proper Signification, or at least the common and usual Intendment of the Words of her Grant, and as well the proper and apt Signification, as the usual Intendment of a Portion of Tithes, is of Tithes in gross, and not Parcel of the Rectory, and therefore no Tithes Parcel of the Rectory in the Case at Bar shall pass. And as to 3 Point, when the Queen granted *totam illam portionem, &c. ad tunc vel nuper in occupatione Johannis Corbet*, and *Corbet* had no Tithes there, it was resolv'd, that nothing (d) pass thereby: For admitting that this Word (*portio*) shall be taken for a Part, then the Effect of the Grant is, *totam ill' partem decimar' nostr' in occupatione J. Corbet*, and in Truth he never had any Part, without Question nothing shall pass for the Incertainty, if it was in the Case of a common Person

(a) Cro. Car.
148. Moor 45.
Palm. 83.

(b) 2 Co. 24. a.
8 Co. 56. b.
15. b. 3 Bullstr.
105, 107, 108.
1 Roll. Rep. 319. a.
(c) Godb. 35
3 Keb. 413.

(d) Lit. Rep. 63.
66. 2 Roll. 192.
193. Cro. Jac.
48. 680. Lanc.
11, 111. Poph.
60. Mo. 755.
3 Keb. 413. Hard.
225. 2 Roll. Rep.
118. Godb. 423.
2 Co. 33. a.
3 Co. 10. a.
10 Co. 113. a.

BOZOUN'S Case. PART IV.

a fortiori in the Queen's Case. As to the last Point, these two Differences were taken and resolv'd by the Court, *s.* when a Clause of *Non obstante* shall make the Queen's Grant good, when not. 1. When the Queen by the Common Law can't in any Manner make a Grant, there a (*a*) *Non obstante* of the Common Law will not against the Reason of the Common Law make the Grant good; but when the Queen may lawfully by the Common Law make the Grant, but the Common Law requires that she shou'd be so instructed, that she be not deceived, there a (*b*) *Non obstante* supplying it, stands with the Reason of the Common Law, and shall make the Grant good. And therefore if the King grants (*c*) a Protection in a *Quare Impedit*, or *Affise*, with *Non obstante* of any Law to the contrary, this Grant is void; for by the Common Law Protection doth not lie in either of those Cases, for the Loss which may happen to the Plaintiff, by such great Delay, and therefore the *Non obstante* can't avail, when by the Common Law the King can't grant it for the Reason aforesaid, as it is ruled in 39 H. 6. 39. *a.* But when the King makes a Lease for Life, or for Years, he has the Reversion in him which he may lawfully grant; But the Law requires that the King in this Case be not deceived in his Estate, *s.* to grant the Possession of the Land, where he has but the Reversion: And therefore when he (*d*) grants the Land, notwithstanding (*e*) that it be in Lease for Life, or Years, of Record or otherwise, or if he grants the Land, (*f*) and further grants the Reversion of it dependant or expectant upon any Estate for Life or for Years, in both these Cases the Grant is good; First, because it stands with the Reason of the Common Law, *s.* that the King be not deceived in his Grant. 2. In some Case it may be doubtful whether the Lease in Possession be good or not; and if the King recites it, and grants the Reversion, and afterwards it shou'd be determined by Judgment in Law that the Lease was void, the Grant will be void also, which often trenches to the Disenherison of the Patentee, which Hazard is avoided by this Resolution. 3. Admitting that all the Leases be good, if they all ought to be recited, or otherwise the Letters Patents shou'd be void: 1. It wou'd be great Danger to the Patentee if he omits or miscites any of them. 2. Greater Danger if any Lease be not enrolled: 3. Great Charge in Search for them, and greater Charge in Recital of them, which in some Cases draws the Letters Patents to such infinite Length, that they deserve to be called *Elephantii libri*; and all this Danger, Charge, and Prolixity is helped by this Resolution. 2. When the Words of the Grant are not sufficient *ex vi termini* to pass the Thing granted, but the Grant is utterly void, there no *Non obstante* can make the Grant good: As in the Case at Bar, the K. grants *totam illam*

(a) Dav. 75, 76.
Vaugh. 334.
2 Roll. Rep. 17.
115. Hard. 110,
232.

(b) Hob. 229.
2 Roll. Rep. 359.

(c) Co. Lit.
131. a. 10 H. 4.
6. a. 27 H. 6. 1. b.
39 H. 6. 39. a.
1 Roll. 325. Er.
Protection 8.
Fitz. Essoign
185. 45 Ad. 21.
per Thorp.

(d) 2 Roll. 190.

(e) Cro. Car.
198. Hob. 229.
(f) 2 Roll. 191.
1 And. 46.

portionem decimarum in Longham, nuper in tenura J. C. here the Addition of *J. C.* as has been said, is of the Substance of the Grant, and because *J. C.* never had any Portion there, the Grant is void *ex vi termini*, and therefore *Non obstante* can't make it good: But in Case of Grant of Land which is in Lease for Life, or for Years, there by the Grant of the Land the Words are sufficient *ex vi termini* to make the Reversion pass; but the Law requires that the Queen be not deceived in the Thing which she grants, and that is supplied by the *Non obstante*: And so the Case of the Reversion which was strongly urged of the Plaintiff's Part, is upon evident Reason answer'd and resolv'd. *Will. Daniel* and *Robert Snagge* were of Council with the Plaintiff, and *Godfrey* and *Coke* with the Defendant. And the said Letters Patents were not made good by the Statute of 18 *Eliz. cap. 2.* for they were Patents of (a) Concealments, and (a) Co. 76. B. therefore by express Proviso excepted out of the said Act.

F 4

Mich.

*Mich. 26 & 27 ELIZABETHÆ,
In the King's Bench.*

TYRRINGHAM's Case.

13 Co. 66.
2 Brownl. 47.

IN Trespas between *Pheasant* Plaintiff, and *Salmon* Defendant, the Case was such; *Tho. Tyrringham* was seised of an House, 44 Acres of Land, 7 Acres of Meadow, and two Acres of Pasture in *Titchmersh* in the County of *Northampton*; to which House, Land, Meadow and Pasture, he and all those whose Estate he had, had used to have Common of Pasture for Oxen, Cows, and Heifers levant and couchant upon the House, Land, Meadow, and Pasture, as well in 30 Acres of Land in the same Town, (whereof one *John Pickering* was then seised in Fee) as in 40 Acres of Land and Pasture in *Titchmersh* aforesaid (whereof one *Boniface Pickering* was then seised in Fee) as to the said House, Land, Meadow, and Pasture appertaining. And afterwards the said *Boniface Pickering* being seised as aforesaid, of the said 40 Acres, purchased to him and his Heirs the said House, 44 Acres of Land, 7 Acres of Meadow, and two Acres of Pasture, to which, &c. and so seised as well of the said 40 Acres in which, as of the said Tenements, to which, &c. demised the House, Land, Meadow, and Pasture to which, &c. to *Pheasant*, who put in two Cows into the said 30 Acres to use the said Common, and the said *Salmon* who was Farmer of the said *John Pickering*, with a little Dog, leviter & moliter drove out the said Cows, and the said *Pheasant* brought his Action of *Trespas* for chasing of his Cattel. In this Case divers Points were resolv'd by *Wray C. J.* *Sir Thomas Gawdy*, & *totam Curiam*. First, that Prescription don't make a Thing appendant, unless the Thing which shall be appendant agrees in Quality and Nature to the Thing to which it shall be appendant; as a Thing corporate can't be appendant to a Thing (a) corporate, nor a Thing incorporate to a Thing incorporate, as it is held

(a) Co. Lit.
121. b. 122. a.
1 Roll. 230.
Plowd. 85. b.
170. a. Godb.
353.

held in *Hill & Granges's Case*, *Plow. Com.* 168. *a. b.* But a Thing incorporate, as an Advowson to a Thing corporate as to a Manor; or a Thing corporate as Land, to a Thing incorporate as an (*a*) Office, as it is there also held: But every Thing incorporate can't be appendant to a Thing corporate; as Common of (*b*) Turbary can't be appendant to Land, but to an House, as it is held in 5 *Aff. 9.* for the Thing which is appendant ought to agree with the Nature and Quality of the Thing to which it is appendant, and Turfs are to be spent in an House: So 10 *E. 3. 5.* (*c*) a Leet can't be appendant to a Church or Chappel, for they are of several Natures. The Beginning of Common appendant by the ancient Law was in such Manner; When a Lord (*d*) enfeoff'd another of Arable Land, to hold of him in Soccage, *i. e.* (*e*) *per servicium Socæ*, as every such Tenure at the Beginning (as *Littleton* saith) was, the Feoffee *ad manutenendum servicium Socæ*, should have Common in the Lord's Waits for his necessary Cattel which plowed and manured his Land, and that for two Reasons. 1. Because it was as it was then held, *tacite* implied in the Feoffment, for the Feoffee could not plough and manure his Land without Cattel, and they could not be kept without Pasture, & *per consequens* the Feoffee shou'd have (as a Thing necessary and incident) Common in the Lord's Waits and Land, and that appears, by the ancient Books in *temp. E. 1. * Common 24. & 17 E. 2. Common 23. & 20 E. 3. Admeasurement 8. & 18 E. 3.* and by the Rehearsal of the Statute of *Merton*, (*f*) *cap. 4.* The 2 Reason was for the Maintenance and Advancement of (*g*) Tillage, which is much respected and favoured in Law; So that such Common appendant is of common Right, and commences by Operation of Law, and in Favour of Tillage, and therefore it's not necessary to (*h*) prescribe therein, as it is held in (*i*) 4 *H. 6. & 22 (k) H. 6.* as it wou'd be if it was against common Right; But it is only appendant to ancient Land Arable *Hide* and *Gain*, and only for Cattel, *f.* Horses and Oxen to plow his Land, and Cows and Sheep to manure his Land, and all for the bettering and Advancement of Tillage, and with this Resolution agree (*l*) 37 *H. 6. 34. a. b. per tot' Cur' & 26 (m) H. 8. 4. a.* as to this latter Point, and therefore it is against the Nature of Common Appendant, to be Appendant to Meadow or Pasture; and because in the Case at Bar the Prescription was to have Common Appendant from Time whereof, &c. to an House, Meadow, and Pasture as well as to Arable Land, by which it appears to the Court that there had been an House, Meadow and Pasture, from Time whereof, &c. it was therefore resolved, that this Common was Appurtenant and not Appendant. But if a Man has had Common for Cattle which serve for his Plough Appendant to his Land, and perhaps of late Time an House is built upon

(a) *Plowd.* 162. a. 169. a. *Dav.* 34. a. *Co. Lit.* 121. b. *Dyer* 71. pl. 43. *H.* 7. 29. a. *1 Rol.* 230. *(b) Co. Lit.* 121. b. *Br. Comm.* 36. *(c) Co. Lit.* 121. b. *1 Rol.* 230.

(d) *2 Inst.* 85. *(e) Lt. Sect.* 119. *Co. Lit.* 86. b.

* *2 Inst.* 86. *Postea* 38. a. *(f) 2 Brownl.* 298. *2 Inst.* 85. *2 Co.* 25. b. *(g) 2 Inst.* 86. *2 Brownlow* 297. 298.

(h) *Co. Lit.* 121. a. *Cro. Car.* 542. *4 H. 6.* 13. a. *Br. Common* 11. 34. *Br. Prescrip-* tion 23. 30. *Dyer* 299. pl. 32. *22 H. 6.* 10. a. *(i) 4 H. 6.* 13. a. *(k) 22 H. 6.* 10. a. *(l) Br. Common* 13. *(m) Br. Comm.* 1.

TYRRINGHAM's Case. PART IV.

Part, and some Part is imployed to Pasture, and some for Meadow, and that for Maintenance of Tillage which was the Original Cause of the Common, in this Case the Common remains appendant, and shall be intended, in Respect of the continual Usage of the Common for Cattel levant and couchant upon such Land, at the Beginning all was Arable, but in Pleading he ought to prescribe to have it

(a) Co. Lit. 4. 2. appendant to Land, and altho' (a) *terra dicitur a terendo, quia vomere teritur*, yet *terra* includes all, and altho' now it is Pasture or Meadow, yet it is Arable, *id est*, may be ploughed, altho' it is not now in Tillage and ploughed: But if he prescribes to have it appendant to an House, or Meadow, or Pasture, then it appears of his own shewing as has been said, That there has been always an House, Meadow, and Pasture, and then he can't have Common as appendant to it, but such is Common appurtenant. A Man may prescribe to have Common appendant to his Manor, for all the Demesns shall be intended Arable, or at least shall be in Construction of Law *reddendo singula singulis* appendant to such Demesns as are ancient Arable Land, and not to any Land newly plowed and improved to be Arable out of his Wafts and Moors Parcel of the Manor, and therewith agrees 5 *Aff.* 2. Also when a Man claims Common appendant to his Manor, no Incongruity, as in the Case at Bar appears of his own shewing. So Common may be claimed to be appendant to a Carve of Land, and yet

(b) 9 Co. 124. 2. Plowd. 168. b. Co. Lit. 69. a. 2 Brownl. 297. (b) a Carve of Land may contain Pasture, Meadow, and Wood, as it is held in 6 E. 3. 42. but no Incongruity appears there, and it shall be applied to that which agrees with the Nature and Quality of a Common appendant.

2. It was resolv'd that Common appendant may be apportioned for two Reasons: 1. Because it is of common Right, and therefore if the Commoner purchases Parcel of the Land in which, yet the Common shall be apportioned; as if the Lord purchases Parcel of the Tenancy, the Rent shall be apportioned: So if *A.* has Common appendant to 20 Acres of Land, and enfeoffs *B.* of Part of the said 20 Acres to which, &c. this Common shall be (c) apportioned, and *B.* shall have Common *pro rata*. And where it was objected, that the Prescription fails in both the Cases; for in the first Case he never had Common in Part of the Land only, but intirely in all; and it would be now a Prejudice to the Terre-Tenant if he shou'd have Common in the 30 Acres only for all the Cattel levant and couchant upon all the Tenements to which, &c. And in the latter Case, no Common was ever appendant to Part of the Land, but intirely to the whole: Also in Assise of Common all the Terre-Tenants ought to be named, and that can't be when the Com. himself has purchased Part of the Land. As to these Objections, it was answer'd and resolv'd, That as to the 1st, the Prescription ought to be special, *s.*

(c) 8 Co. 79. a. Hob. 25. 1 Rol. 234. Co. Lit. 122. a. 2 Brownl. 297, 298.

to prescribe to have Common in the whole 'till such a Day, and then to shew the Purchase of Part, and from that Time that he has put in his Cattel into the Residue *pro rata portione*; as in the Cases, when a Corporation has Liberties by Prescription, and within Time of Memory the Corporation is altered, there ought to be special Prescription: As to the second Case, *s.* when Part of the Land to which, *&c.* is aliened, there every of them may prescribe to have Common for Cattel levant and couchant upon his Land, and in none of these Cases no Prejudice accrues to the Tenant of the Land in which the Common is to be had, for he shall not be charged with more upon the Matter than he was before the Severance; and God forbid the Law should not be so, when Part of the Land to which, *&c.* is aliened; for otherwise many Commons in *England*, (which God forbid) wou'd be annihilated and lost: And it was agreed, that such Common which is admeasurable, shall remain after the Severance of Part of the Land to which, *&c.* But in the Case at Bar, for as much as the Court resolved, That the Common was appurtenant and not appendant, and so against common Right, it was adjudged, That by the said Purchase (*a*) all the Common was extinct; For in such Case Common appurtenant can't be extinct in Part, and be *in esse* for Part by the Act of the Parties. And as to the last Objection, it was answer'd and resolv'd, that if upon the Matter the Common appendant shou'd be apportioned, then the Terre-Tenant shou'd be only named out of the Land charged with the Residue of the Common, as in Case where a Rent-charge is apportioned in Case of Descent, the Tenant of the Land shall be only named out of which the Residue of the Rent which remains issues. And it was said, in this Case this Word (*b*) (*perviniens*) is *Latin*, (*b*) as well for appurtenant as for appendant, and therefore *sub-* *jecta materia*, and the Circumstance of the Case ought to direct the Court to judge the Common to be appendant, or appurtenant. 3. It was resolved, that (*c*) Unity of Possession of the whole Land to which, *&c.* and of the whole Land, in which, *&c.* makes Extinguishment of Common appendant against the Opinions II *E.* 3. *Common* (*d*) II. 14 *Aff.* 21. 15 *Aff.* 2. 20 *E.* 3 (*e*) *Admeasurament* 8. The Reason of which Opinions was, because the Land to which the Common was claimed was ancient Land *Hide* and *Gain*, and for Maintenance and Advancement of Tillage, but in as much as it was against a Rule in Law, *s.* when a Man has as high and perdurable Estate as well in the Land as in the Rent, Common, and other Profit issuing out of the same Land, there the Rent, Common, and Profit is extinct, and therewith agrees 24. *E.* 3. 25. 4. In this Case *Wray C. J.* said, That Common for Cause of Vicinage is not Common appendant, but in as much as it ought to be by Prescription, from Time whereof, *&c.* as Com. appendant ought, it is in this Respect resembled to Com. appendant, but Com. appurtenant and in

(a) Co. Lit. 122. a.

Hob. 25, 235.

8 Co. 79. 2.

Winch. 45. Hur.

58. Cro. El.

394. Cro. Car.

482. 1 Jones 397.

2 Brownl. 298.

(b) Co. Lit.

221. b. 2 Inst.

86. 2.

(c) Cro. El. 570.

Moor 462.

Poph. 166. Owen

122. 2 Brownl.

47, 297. 2 Sid.

111.

(d) Antea 27. a.

2 Inst. 86.

(e) 2 Inst. 86.

TYRRINGHAM's Case. PART IV.

(a) Co. Lit. 121. b. grofs, may commence either at this (a) Day by Grant, or by Prescription. And *Wray* Chief Justice further said, That in Case of Common for Cause of Vicinage the one may enclose (b) against t'other, for he who has such Com. can't put his Cattel in the Land of the other, but he ought to put them in the Land where he has Common, and if they efray into the other Land, they are excused of Trespafs, by Reason of the ancient Usage which the Law allows to avoid Suits which would arife, if Aétions shou'd be brought for every such Trespafs, when no Separation or Enclosure is between the Commons, and therefore he said, that one may enclose against the other, for (c) *cessante causa cessat effectus*. 5. It was resolv'd without any Difficulty, that when the Plaintiff's Cattel came into the Defendant's Land, and did him Trespafs, the Defendant (d) with a little Dog might chase them out, and shou'd not be compelled to restrain them Damage feasant. *Nota Reader*, according to the said Opinion of *Wray C. J.* it was now lately adjudged in the *King's Bench*, between *Smith Pl.* and *How* and *Redman* Defts. where the Case was; That two Lords of two several Manors have two Wafts adjoining (Parcels of their Manors joyning) without Inclosure or Separation, and yet the Bounds of each Manor was well known by certain Bounds and Marks, in which Wafts the Tenants of the one Manor, and of the other, have reciprocally Com. for Cause of Vicinage; in that Case one may enclose (e) against the other, and thereby utterly toll the Common for Cause of Vicinage: Against which two Objections were made. 1. Because it had been used by Prescription from Time whereof, &c. the Beginning of which cannot be known, it wou'd be hard now to break that which has had such Continuance; For as it is said, *Obtemperandum est consuetudini rationabili tanquam legi*. 2. Perhaps the Waft of one was greater or of greater Value than the other, and probably those who had the less at the Beginning gave (f) Recompence to have this Common in the greater, and therefore it wou'd be now unreasonable to do it. As to these it was answered and resolv'd, That the Prescription imports the reciprocal Cause in itself, *f.* for Cause of Vicinage, and no other Cause can be imagin'd; and forasmuch as it is *potius* an Excuse of Trespafs, when the Cattle of the Tenants of the one Manor fray into the Waft of the other Manor, than any certain Inheritance; for it was resolv'd clearly, That the Tenants of the one Manor could not put their Beasts into the Wafts of the other Manor, but they should come there only by Escape, and that the Inclosure is only to prevent the Escape of the Cattle (which is a lawful Act;) for these Reasons it was adjudg'd, that the one might inclose against the other.

Nota Reader, it is true that (g) Agriculture and Tillage is greatly

(b) Dy. 316. pl. 4.
7 Co. 5. a. b.
Co. Lit. 122. a.
1 Rol. 399.
13 H. 7. 13. b. 14. a.
7 E. 4. 5. a.

(c) 13 Co. 38.
Co. Lit. 78. b.
2 Inst. 203. Dav.
3. a. Mo. 181.
15 E. 4. 3. b.
(d) Poph. 162.
2 Roll. 566.
Smith's Case.

(e) Co. Lit.
122. a.

(f) 13 H. 7. 13. b.

(g) Co. Lit.
85. b.

greatly respected and favour'd as well by the Common Law, as by the com. Assent of the King, Lords Spiritual and Temporal and all the Commons in many Parliaments. 1. The Common Law prefers Arable (a) Land before all other, and therefore for its Dignity it ought to be named in a *Præcipe* (a) F. N. B. 2. c. Plowd. 169. a. before Meadow, Pasture, Wood, or any other Soil; and it appears by the Statute of 4 H. 7. cap. 19. that six (b) Incon- (b) Co. Lit. 85. b. veniences are introduc'd by Subversion or Conversion of Arable Land to Pasture, tending to two deplorable Consequences; The first Inconvenience is the Increase of (c) Idleness, the (c) Co. Lit. 85. b. Root and Cause of all Mischiefs. 2. Depopulation and Decrease of populous Towns, and Maintenance only of two or three Herdsmen, who keep Beasts in lieu of great Numbers of strong and able Men. 3. Churches for want of Inhabitants run to Ruin and are destroy'd. 4. The Service of God neglected. 5. Injury and Wrong done to Patrons and Curates. 6. The Defence of the Land for want of Men strong and enur'd to Labour against foreign Enemies weaken'd and impair'd. The (d) two Consequences are: 1. These Inconveni- (d) Co. Lit. 85. b. ences tend to the great Displeasure of God. 2. To the Subversion of the Policy and good Government of the Land, and all this by Decay of Agriculture, which is there said to be one of the greatest Commodities of this Realm, which one Act of Parliament as to this Purpose may as a Figure in Arithmetick, in the 3 Place stand for an Hundred: But I have observ'd that the most excellent Policy, and assured Means to increase and advance Agriculture, is to provide that Corn shall be of a reasonable and competent Value; for make what Statutes you please, if the *Plowman* has not a competent Profit for his excessive Labour and great Charge, he will not employ his Labour and Charge without a reasonable Gain to support himself and his poor Family.

C A S E S

O F

APPEALS *and* INDICTMENTS, &c.

I.

Hil. 28 Elin. B. R.
 Brooke's Case.
 2 Leon. 83.
 * 9 E. 4. 26 b.
 Br. Indictm. 7.
 Cr. Jac. 20.
 (a) Cr. El. 920.
 5 Co. 121. a.
 21 Co. 32. a.
 Doct. pla. 84.
 Hales pl. Cor.
 84, 207.

*R*ichard Vaux brought * Appeal of Burglary against *Thomas Brooke*, and declar'd, that the Defendant *Domum mansonalem præd' Richardi Vaux felonice & burgaliter fregit, &c.* The Defendant pleaded not guilty, and by a Jury of the County of *Bucks*, which appear'd this Term at the Bar he was convicted of the Felony and Burglary aforesaid; and the Defendant's Council mov'd in Arrest of Judgment, that the Declaration was insufficient, because the said Word *burgaliter* was of no Signification, but the Declaration ought to be *burglariter*, or *burgulariter*, and the Offence is called Burglary, or Burgulary, and not Burgale, for there wants an *l* between *g* and *a* and in the latter Syllable *l* is inserted in lieu of *r*, and *burglariter* (a) est vox artis, as felonice † *murdravit*, (b) *rapuit*, (c) *excambium*, (d) *warrantizare*, (e) *frankalmoign*, (f) *Frankmarriage*, and several others which can't be express'd by any Periphrasis or Circumlocution; and this Word (*Burglary*) is deriv'd from these two Words *Burgh* and *Laron*, and therefore Burglary or Burgulary is sufficient, but not Burgale, for that wants Sense; and many Presidents warrant *burgulariter* to be good, but none was found to warrant *burgaliter*: And upon this Exception *Curia advisare vult* 'till next Term; and in the mean Time the Plaintiff dy'd, and that was shewn to the Court by the Defendant's Council as *Amicus Curia*, and made manifest by sufficient Testimony; and thereupon the Court was mov'd, that soasmuch as for this Felony and Burglary he was once convicted at the Suit of the Party, he could never be charg'd with the same Offence at the Suit of the K. that he might be thereof discharg'd, and upon that the Court took Advice: And it was resolv'd, that if the Declaration had been

† Co. Lit. 123. b.
 287. b.
 (b) 9 E. 4. 26. a. b.
 Co. Lit. 124. a.
 Stanf. Cor. 24. a.
 32. a. Hales pl.
 Cor. 187, 207.
 Fitz Indictm. 18.
 Br. Indictment 7.
 1 H. 6. 1. a.
 20 H. 7. 7. a.
 Br. Rape 4.
 Br. Appeal 48.
 Fitz Cor. 1.
 Cr. Jac. 20.
 Poph. 42.
 (c) Co. Lit. 50. b.
 51. b.
 1 Rol. 814. b.
 9 E. 4. 21. b.
 Perk. Secd. 253.
 19 H. 6. 27. a.
 Br. Exchange 12.
 10 Co. 24. a.
 (d) Lit. Sect. 733.
 Co. Lit. 9. a. 383. b.
 384. a.
 10 Co. 24. a. (e) Co. Lit. 94. a. b. 10 Co. 24. a. (f) 10 Co. 24. a. Co. Lit. 21. b. (g) Praef. Cr. Car. 3. 2. (b) 3 Inst. 63.

been sufficient, then being convicted at the Suit of the Party, he should not be again impeach'd at the Suit of the King; but it was resolv'd, that the Declaration was insufficient, and thereupon he was discharg'd: And in this Case upon the Evidence *Wray* Chief Justice said, That if a Man has a Mansion-House, and he and his whole Family upon some Accident are Part of the Night (a) out of the House, and in the mean Time one comes and breaks the House to commit Felony, that this is Burglary, for tho' neither the Owner nor any of his Family is in the House, yet it is *domus mansionalis*; and the Words of the Appeal or Indictment of Burglary are, *domum mansionalem præd' R. V. fregit, &c.* And according to this Opinion it was resolv'd, *Hill. 38 Regina Eliz.* by *Popham* Chief Justice, and all the Justices; That where a Man has (b) two Houses, and dwells sometimes in the one and sometimes in the other, and has a Family or Servants in both, and in the Night when his Servants are out of the House, the House is broke by Thieves, that this is Burglary for the said Reason which *Wray* Chief Justice gave.

(a) Mo. 660, 661.
Hales pl. Cor. 82.
3 Inst 64.
Poph. 42.

(b) Hales pl. Cor.
82. Mo. 661.
Poph. 52.

Wetherel (c) brought Appeal against *Darly* of Murther, the Def. pleaded not guilty, and was found guilty of (d) Homicide, and had his Clergy: And afterwards was indicted of Murther, and thereupon arraign'd at the Suit of the Queen, and he pleaded the former (e) Conviction in the Appeal at the Suit of the Party; and it was adjudg'd a good Bar, and thereupon he was discharg'd, for it was a good Bar by the Common Law, and restrain'd by no Statute, and the Reason is because a Man's Life shall not be (f) twice put in Jeopardy for one and the same Offence.

2.
Pacth. 25 Eliz.
(c) Cr. El. 296.
(d) Hal. pl. Cor.
207. Co. Lit. 282. 2
Cr. El. 276, 296,
465. Moor 407.
(e) 3 Inst. 214.

(f) Postea 43. 2.
45. 2. 47. 2.

AT the Assizes held at *Suffex* 25 Febr' anno 28 Eliz. before the Justices of Assise *H. Yong, W. Garland*, and others were indicted, *De eo quod ipsi sexto Augusti, anno 27 vi et armis, videlicet gladiis, &c. apud Lewes prædicti ex malitiis suis præcogitatis in quendam Thomam Butcher, nuper de Lewes, &c. Yeoman, ad tunc & ibidem in pace Dei & dicta Dom' Regina exist' insultum & affraiam fecerunt, & præd' W. Garland cum uno gladio de ferro & chalibi ad valentiam quinque solidorum, quem idem Willihelmus in manu sua dextra ad tunc & ibidem habuit & tenuit, violenter & felonice, & ex malitia sua præcogitata præfatum Thomam Butcher ad tunc & ibidem percussit, dans eidem Thomæ Butcher ad tunc & ibidem unam plagam mortalem*

3.
Suffex.
Trin' 28 El.
Yong's Calc.

Cases of Appeals and Indictments. PART IV.

talem super faciem ipsius T. Butcher, & cum præd' gladio amputavit nasum suum a facie sua, partem labiorum suorum, ac partem menti sui voc' the Chin. Et præd' Henricus Tong cum quodam alio gladio, &c. (ut supra) præf' T. Butcher antunc & ibid' percussit (a) & perforavit, dans eidem T. Butcher adunc & ibid' unam aliam plagam mortalem circiter pectus usq; ad ossa humer' ipsius T. Butcher, latitudinis unius pollicis & dimid' & profunditatis septem pollicium, de quibus quidem plagis & vulneribus sic per præfat' W. G. & H. T. in forma prædict' prius dat', dictus T. Butcher eodem sexto die Augusti, anno 27 suprad' apud Lewes præd' in com' præd' instantier obiit, & præd' Thomas Brewer præd' sexto die Augusti, anno 27 supradicto apud Lewes præd' in com' præd' ex malitia sua præcogitata fuit felonice præsens, abetians, procurans, confortans, & auxilians præfatos H. T. & W. G. ad feloniam & murdrum præd' in forma præd' faciend' exequend' & perpetrand' contra pacem dicta Dom' Regina coronam & dignitatem suam; & sic juratores præd' dicunt super sacramentum suum qd' præd' H. T. W. G. & Thomas Brewer præfat' Thomam Butcher præd' sexto die Augusti, anno 27 supradicto apud Lewes præd' in com' præd' felonice & ex malitiis suis præcogitat' modo & forma præd' interfecer' & murderaverunt contra pacem, &c. And it was mov'd that this Indictment was insufficient, because unam

- (b) Postea 41. a.
 1 Bulstr. 80.
 2 Bulstr. 328.
 1 Rol. Rep. 237.
 2 Inst. 318.

plagam mortal' (b) circiter Pectus, was altogether uncertain, for it might be in the Neck, or in the Arm, or in the Belly, and Indictments ought to express in certain as well in what Part the mortal Wound is, as the Depth and Breadth of it, that it may appear to the Court to be mortal, and because 'tis said that he dy'd de vulneribus & plagis præd' and one of them is uncertainly alledged, it makes the Indictment insufficient as to all; Quod fuit concessum per totam Curiam: And it was said that the Indictment ought to have been, that if the Party did not dye of the first Wound, that he dy'd of the other Wound, and that is the common Course; Ad quod non fuit responsum: And in this Case it was held per totam Curiam, that if upon an Affray the Constable and (c) others, in his Assistance, come to suppress the Affray, and preserve the Peace, and in executing their Office the Constable or any of his Assistants is kill'd, it is Murther in Law, altho' the Murtherer knew not the Party that was kill'd, and altho' the Affray was sudden, because the Constable and his Assistants came by Authority of Law to keep the Peace and prevent the Danger which might ensue by the Breach of it; and therefore the Law will adjudge it Murther, and that the Murtherer had Mallice prepenfe, because he set himself against the Justice of the Realm: So if the Sheriff or any of his Bailiffs or other

- (c) 9 Co. 66. a.
 Jenk. Cent. 291.
 Cr. Jac. 280.
 3 Inst. 52.
 Hales pl. Cor. 45.
 9 Co. 67. b.

Officers is kill'd in executing the Proceſs of the Law, or in doing their Duty, it is Murther; the ſame Law of a

(a) 9 Co. 66. a. 68. b
3 Inſt. 52.
Cr. Jac. 280.
Hales pl. Cor. 45.

4.

Walker was indicted and outlaw'd of Murther, and the Indictment was, that he ſtruck the Deceaſ'd in (b) *ſiniſt' parte ventris circa umbelicam*, and it was reſolv'd *per totam Curiam*, that the Indictment was certain enough, for in *ſiniſtra parte ventris*, was of itſelf certain and ſufficient, and theſe Words *circa umbelicam*, which were uncertain, were abundant and ſuperfluous: But *Yong's Caſe* before, was affirm'd to be good Law, for there was no Certainty before the (c) *circiter*: But the Outlawry was reverſ'd for other Errors, and Walker was put to plead to the Indictment.

Tr. 41 El. in B.R.
Walker's Caſe.
(b) Cr. Jac. 95.
5 Co. 121. B.
(c) Antea 40. b.
1 Bulſtr. 80.
2 Bulſtr. 328.
1 Rol. Rep. 237.
2 Inſt. 318.

5.

Inquiſitio indentata capt' apud Baſingſtroke in com' praed' 21 die Decembr', &c. coram Johan' Scullard gen' uno Coronator' dieſ' Dom' Reginae in com' praed' ſuper viſum corporis Edwardi Savage gen' tunc & ibidem mortui jacen', per ſacramentum Jacobi Serle, &c. Ad inquirend' qualiter & quomodo praed' Edw' Savage ad mortem ſuam devenit, qui dic' ſuper ſacrm' ſuum quod Jacobus Heydon de S. in com' praed', Yeoman, T. M. W. M. and ſeveral others, quarto die Auguſti anno 27 apud B. praed' in com' praed' circa (d) horam decimam ante meridiem ejuſdem diei ex malitiis ſuis praecogitatis felonice ut felones dicta Domine Reginae in dict' Edw' Savage adtunc & ibidem inſultum & Affraiam fecerunt, & quod praed' Jacobus Heydon cum quodam gladio, Anglice, a Sword, valor' quinque Solidor' quem idem Jacobus in manu ſua dextra tenebat, adtunc & ibidem praefat' Edwardum Savage felonice percuffit, & dedit eidem Edwardo adtunc & ibidem unam plagam mortalem ſuper ſiniſtrum genu ipſius Edwardi totaliter abſcindens quoddam os praed' genu ipſius Edwardi, vocat', the Pan of the Knee, de qua quidem plaga mortali idem Edw' Savage languebat a praed' quarto die Auguſti anno 27 uſq; ad decimum nonum diem menſis Decembris anno 28, quo quidem decimo nono die Decembr' idem Edw' Savage ex mortali plaga praed' apud B. praed' in com' praed' obiit, et ſic Furatores praed' die ſuper ſacrm' ſuum quod praedictus Jacobus Heydon modo & forma praedicta praedictum Edwardum Savage felonice & ex malitia ſua praecogitata interfecit & murdravit contra pacem dicta Domine Reginae

Southampton
Tr' 28 El. in B.R.
Heydon's Caſe.

(d) 1 Bulſtr. 83.

G

Reginae

Cases of Appeals and Indictments. PART IV.

Regina coronam & dignitatem suam: Et ulterius præd' Juratores super sacramentum suum præd' dicunt quod præd' T.M. W.M. &c. tempore feloniam & Murdrum præd' in forma præd' fact' scilicet dicto quarto die Augusti apud B. præd' in com' præd' anno 27 supradicto circa horam decimam ante meridiem ejusdem diei felonice fuer' presentes cum gladiis, &c. tunc & ibidem auxiliantes, assistentes, abettantes, confortantes & manutinentes præd' Jacobum Heydon ad feloniam & murdrum præd' faciend' & perpetrand' contra pacem dicta Domina Regina coronam & dignitatem suam. And many Exceptions were taken against this Indictment: 1. Because the Indictment was taken before J. S.

(a) 2 Rolls 803.
(b) Godb. 64. 66.
Plowd. 75. a.

coronatore in (a) com' præd', and did not say coronatore comitatus præd', nor (b) de com' præd', and every Coroner of a County is a Coroner in every County of England, but not of every County; but non allocatur; for the Court said, that Coroner in the County, &c. shall be in all reasonable Intendment taken to be Coroner of the County, and that is prov'd

(c) F.N.B. 163. b

by the Writ de (c) coronatore eligendo, the Beginning of which is, *Rex Vicecom', &c. quia L. nuper unus coronatorum nostrorum in com' tuo diem clausit extremum, &c.* And so it is taken in the Lord Willoughby's Case in Plowden's Commentaries, fol. 75 & 76. And Presidents almost innumerable were shewn in the same Manner as this is, and it was said, *quod nimia (d) subtilitas in jure reprobat.* 2. Exception was taken, because it was not said that the said Edward Savage who was kill'd,

(d) 5 Co. 121. a.
Antea 5. b.
3 Bulfr. 65.

was in (e) pace Dei & Domina Regina, (as the usual Form, and the Presidents are) sed non allocatur, for those are Words but of Amplification of the Heinousness of the Act, and not of Substance, and perhaps he was not in Peace, but fighting and breaking the Peace, and many Presidents were likewise shewn in which those Words were omitted. 3. Because 'twas said, & dedit eidem Edw' ad tunc & ibidem, &c. and did not say

(f) Godb. 65. 66.
Dy. 68. 69. pl. 28.
Stanf. Cor. 120. a.
1 Bulfr. 93.

felonice, nor ex (f) malitia sua præcogitata dedit, &c. and this Exception was disallow'd by the Court, for this Conjunction (&) couples the Sentences together, so that these Words

(g) Lit. Rep. 68.

(g) (felonice & ex malitia sua præcogitata) first mention'd, refer to all the Verbs subsequnt, or otherwise too much Repetition and Tautology wou'd be made of the said Words and many Presidents were likewise shewn to such Effect, and in the same Form as this is, as to this Point; and these Words ad tunc & ibid' make this Point clear, for ad tunc & ibid' make all to be done at one and the same Instant. The 4 Exception was because

because the Depth (a) and Breadth of the Wound was not shewn, as is always usual in Indictments, so that it may appear to the Court that the Wound was mortal; But it was answer'd and resolv'd by the Court, that it could not be in this Case, because all the Pan of the Knee was (b) entirely cut off; as if an Arm or (c) Leg is cut off, or if a Man is beheaded, the Depth or Breadth of the Wound shall not be shewn. The 5th Exception was, because 'twas said *tempore felonie & (d) murdred' prad'* whereas it should be *murdri*, and this Exception was also disallow'd, for *tempore felonie prad'* had been sufficient without saying *murdred'*, and therefore the Addition of that shall not make the Indictment insufficient, forasmuch as *Murdredum* is a Word insensible and vain, so that no Contrariety or Repugnancy appears, for (e) Surplusage will not hurt but when it is repugnant or contrary to the Matter precedent or subsequent. The 6th Exception was, because the Wound was given the 4th Day of August, and the Death was the 19th Day of December next ensuing, and the Indictment says that *prad' T. M. W. M. &c. tempore felonie & murdred' prad' fact', scilicet 4 Augusti, &c. felonice fuerunt presentes, &c. ad feloniam & murdrum prad' in forma prad' faciend'*: To which it was said by Gawdy the Queen's Serjeant, and Popham the Queen's Attorney, that the Death has Relation to the Stroke, for if a Man *non compos (g) mentis*, strikes himself, and afterwards becomes *compos mentis*, and dies, the Death shall have Relation to the Stroke, and he shall forfeit nothing, as it is agreed in 22 E. 3. Corone 244. So (h) Stamford says, that the Appeal shall be brought within the Year after the Stroke, and not the Death, for when the Death ensues, now in Judgment of the Law the Felony was committed the Day when the Wound was given, for the Death is but *quodammodo* the Execution of the Felony; but *tota Curia in Banco Regis* against that; and they said they had often adjudg'd Indictments insufficient, when the Stroke is one Day, and the Death another, and the Jury concluded the Murder or Homicide to be committed the first Day; but they said that in the Case at Bar the Indictment should be that the said *presentes & abstantes fuerunt presentes, auxiliantes, &c. ad feloniam & murdrum prad' in forma prad' faciend'*. Another Reason to maintain the Indictment was urg'd, because the Indictment notwithstanding that was sufficient enough, for the Office of the Jury is to find *veritatem facti*: (i) and the Office of the Judges is to declare *veritatem juris*; and because they have found the whole Circumst. and Truth of the Fact, that without Question the Law makes them Principals.

(a) Godb. 65, 66.
2 Inst. 318.
Stamf. Cor. 79, a.
5 Co. 121, b. 122, a.(b) 2 Inst. 318.
5 Co. 122, a.
(c) 5 Co. 122, a.(d) Godb. 65, 66.
5 Co. 121, b.

(e) 5 Co. 121, b.

(f) Plowd. Com.
401.(g) 3 Inst. 54.
1 Co. 99, b.
Plowd. 260, a.
Mo. 140. Stamf.
Cor. 19, b. 20, a.(h) 2 Inst. 320.
Stamf. Cor. 63, a.
Dyer 50. pl. 93, 10.
2 Inst. 318, 329.
3 Inst. 53.
Cr. El. 196, 739.(i) 11 Co. 10, b.
2 Bullst. 204, 251,
305, 314.
1 Sid. 127.
8 Co. 155, a.
9 Co. 13, a. 25, a.
Co. Lit. 125, a.
155, b. 226, a.
Plowd. 114, b.

Cases of Appeals and Indictments. PART IV.

cipals, therefore altho' they take upon themselves also the Office of Judges, *s.* to decide when and at what Time the Felony was committed, it shall not make that vicious which they have found sufficiently and certainly; for in all Cases when a (a) Jury find the Matter committed to their Charge at large, and further conclude against Law, the Verdict is good and the Conclusion ill: Moreover 'twas mov'd in Maintenance of the Indictm. that the Indictm. against them was good, in Regard it appears by the Indictment that they all of their Malice prepenſe, feloniously and as Felons made the Assault, and then altho' *Heydon* (b) only gave the Wound, yet it appears by the Connection of all the Parts of the Indictment, by the Conjunction, and by the Adverbs *adunc & ibidem*, that they were present, &c. And thereupon *Wray* Chief Justice, Sir *Thomas Gawdy*, *Shute*, and *Clench* would be advised; and afterwards upon Conference had with the other Justices, the said Indictment, as to the said 6th Exception, was held repugnant and insufficient as to the said *T. M. W. M.* &c. for no Felony was committed 'till the Death, and none shall be adjudg'd a Felon by Relation, which is but (c) a Fiction of the Law: And *Wray* C. J. said, the common Experience of the *King's Bench* was, and so was the Law without Question, that the Year to bring the Appeal should be accounted from (d) the Death and not from the Stroke, against the Opinion of (e) *Stamford*: But it was resolv'd, that to conclude that he committed the Murther the last Day was sufficient, but the better Form is to conclude that he committed the Murther (f) *modo & forma suprad.* 2. That the said Clause of present, aiding, &c. was necessary, and without it the Indictment was insufficient, for it shall not be maintain'd by Argument or Implication, nor supply'd by Intendment, and so as to this 2d and last Point it was resolv'd in *Milborn's Case*, *Pasch' 1 Jac. Regis*, in the *King's Bench*; and because the Indictment wanted the said Clause, he and divers others were discharg'd.

(a) 11 Co. 10. b.
Mo. 105, 269.
Cr. El. 41, 481,
482. Hob. 53.
Plowd. 112. b. 114
b. Cr. Car. 75, 76,
212. 12 Co. 15.
Hurt. 121. Dy. 361
pl. 15. Hard. 347.
2 Rol. 701. 702.
(b) 11 Co. 5. b.
Plowd. 98. a.
34 H. 8. Br. Cor.
271. 1 Rol. Rep. 37
3 Inft. 138.

Vide Cole's Case.
Pl. Com. fol. 401.
& 11 H. 4. 12.
(c) 2 Inft. 318.

(d) 2 Inft. 320.
3 Inft. 53.
Stamf. 63. a.
(e) 2 Inft. 318.
Cr. El. 196. 739.
Dy. 50. pl. 9. 10.
2 Inft. 320. 3 Inft.
53. Postea 47. a.
(f) 2 Inft. 318.

6. *Catharine* (g) *Hume* brought Appeal of Murther against *Luke Ogle* of the Death of *A. H.* her Husband, and declar'd that the Def. 27 *Septembris*, gave the mortal Wound at *Weetwood in com' Northumb'*, and that the Husb. the same Day of the Wound aforesaid, *apud Westlibborn in eodem com' obiit, & sic prad' Lucas Ogle apud Weetwood prad' modo & forma prad'* the said *A. H. felonice, &c. murdravit*; and it was resolv'd that the Declaration was repugnant and insufficient, for as it (h) can't be said, that he murder'd him the first Day, as it was adjudg'd before in *Heydon's Case*, so it can't be said that he murder'd him at the (i) Place where he was struck, but where he dy'd.

Mic. 32 & 33 El.
(g) Cr. El. 196.

(h) 2 Inft. 318, 320.
3 Inft. 53.
Dy. 50. pl. 9. 10.
Cr. El. 196, 739.
(i) 7 Co. 2. a.

Hudson brought Appeal of Maihem against Lee, and declared that the Def. the 8th Day of *Jan. 28 Eliz.* feloniously maihem'd him in his Left Hand, &c. The Defendant pleaded that heretofore and before the Appeal commenced, the Plaintiff brought an Action of Trespafs in the *Common Pleas* of Assault, Battery and Wounding, against the Def. the same 8th Day of *January, anno 28* aforesaid, to which the Defendant pleaded not guilty, and was found guilty, and Damages assess'd to 200 Marks for the Assault, Battery and Wounding, and 10*s.* Costs, and Judgment thereupon given and Satisfaction acknowledged before the Appeal brought, and averr'd, that the Battery and Wounding in the said Action of Trespafs, and the said Maihem, whereof the Appeal is now brought, was all one and not several: And it was mov'd, that it was no Bar for two Reasons. 1. Because the Appeal of Maihem is of an higher Nature than the Action of Trespafs, for in the Appeal the Plaintiff declares that the Def. *felonice* maihem'd him, *vide* 40 *Aff. 9.* where the Plaintiff declares, that the Def. *felonice* (a) *ut Felo Dom' Regis* maihem'd him, and the Rule of the Law is, that a Recovery or Bar in any Action is a good Bar in another Action of an equal or inferiour Nature, but not in an Action of a (b) superiour Nature, as a Recovery or Bar (c) in Assise is a good Bar in another Assise, 44 *E. 3. 45.* 9 *H. 7. 23.* &c. but not in (d) *Mortdauncester*, 5 *Aff. 1.* nor is a Recovery or Bar in *Mortdauncester*, a Bar in a Writ of Right, (e) *F. N. B. 3. 30 Aff. 5. 11 E. 3. Entre 56.* &c. And a Bar in an Action of Trespafs of (f) Goods taken away is no Bar in Appeal of Robbery, for the Appeal of Robbery is higher, as it is held in 2 *R. 3. 14.* And this was mov'd, admitting the Appeal was brought for the same thing for which the Action of Trespafs was brought: But 'twas further mov'd, that the Appeal is brought for the Maihem only, and therefore it is said *felonice*, which can't be apply'd to Trespafs, and the Action of Trespafs for the Battery and Wounding, which does not touch the Maihem: and therefore it's agreed in 22 *Aff. 82.* That after the Plaintiff in the Appeal has recover'd for the Maihem, (g) he may have an Action of Trespafs for the Battery, whereby it appears, that the Appeal concerns the Maihem only: But it was resolv'd *per totam Curiam*, that the (h) Bar was good, for in all Cases when the Plaintiff for a Wrong or Injury is only to recover Damages, he shall not be twice satisfy'd for one and the same Thing, *juxta illud; (i) nemo debet bis puniri pro uno delicto, & (k) Deus non agit bis in ipf;* But in both these Actions, *s.* of Appeal and Trespafs the Pl. shall only recover Damages (l) and it appears to

7.
Hill. 21 El. in B.R.
Hudson, v. Lee.
1 Leon. 51. 318.
319. Mo. 268.
Goulds 33.
Styl. 347.

(a) Br. Appeal 72

(b) 6 Co. 7. b.

5 Co. 33. a.

(c) Doct. pla. 67.

(d) Doct. pla. 67.

(e) F. N. B. 5. n.

(f) Doct. pla. 67.

(g) 1 Leon. 319.

Br. Appeal 60.

Br. Trespafs 241.

(h) Doct. pla. 67.

1 Leon. 19. 319.

Moor 268.

2 Rolls 112.

(i) 8 Co. 118. b.

2 Vent. 170. 5 Co.

61. 21. 11 Co. 59. b.

Cr. Jac. 481.

Cawly 78. Noy. 82

1 Rol. Rep. 95.

Bridgm. 122.

Wing. Max. 695.

(k) 8 Co. 118. b.

(l) Co. Lit. Sect.

194. 582.

Co. Lit. 126. b.

the 288. a.

Cases of Appeals and Indictments. PART IV.

(a) *Hurt. Arg.* 57.

the Court by the Defendant's Bar, which the Plaintiff by his Demurrer has confess'd, that he himself in the Action of Trespass, which he brought for the Battery and Wounding, has recover'd Damages for the Maihem, for Wounding includes the Maihem and more, and the Def. has averr'd, that the Wounding in the Action of Trespass, and the Maihem in the Appeal were all one: so altho' the Appeal of Maihem is an higher Action, yet forasmuch as he shall therein only recover Damages, and Damages he has recover'd in the Action of Trespass, it was therefore resolv'd, that the Bar in the Case at Bar was good: And *Wray* Chief Justice said, that so it was (b) now lately adjudg'd in this very Court, which Record he had seen, and it agreed with the Book in 41 *Aff.* 16. and the Book 2 *R.* 3. 14. is good Law, for in the Appeal of Robbery the Plaintiff shall have Judgment against the Defendant for his Life, and not for any Damages.

(b) *Moor* 268.
1 *Leon.* 219.

8.

Tr. 32 *El.* in
Syer's Case.
(c) *Halespl. Cro.*
221, 222. *Jenk.*
Cent. 29.
Dalt. Just. 401.
18 *E.* 4. 9. b.
Fitz Inf. 32. b.
33. a.
1 *Rolls* 777.
Vent. Nat. Br.
117. b. 7. 12. b.
Fitz Corone 53.
Br. Clergy 16.
3 *Inst.* 114, 139.
Cr. Car. 566, 567.
Plowd. 99. a. b.
9 *Co.* 117. a.
2 *Inst.* 183, 184.
Stamf. Cor. 47. b.
48. a. 11 *Co.* 35. a.
Cr. El. 541.
3 *H.* 7. 1. b.
Br. Corone 121.
Br. Clergy 15.
Fitz. Cor. 58.
9 *H.* 7. 19. b.
2 *Rolls* 3. 21. b.
Moor 461.
33 *E.* 4. 3. b.
Br. Cor. 137, 157,
264.

9.

Pasch' 39 *Eliz.*
Bibthe's Case.
(d) *Cr. El.* 540,
541. 3 *Inst.* 114.

IT was resolv'd *per tot' Curiam*, That if Principal and Accessory are, and the Principal (c) is pardon'd, or has his Clergy, the Accessory can't be arraign'd; for the Maxim of the Law is, *ubi factum nullum, ibi sortia nulla; & ubi non est Principalis, non potest esse Accessorius*: Then before it appears, that there is a Principal, one can't be charg'd as Accessory, but none can be call'd Principal, before he is so prov'd and adjudg'd by the Law, and that ought to be by Judgment upon Verdict or Confession, or by Outlawry, for it is not sufficient that *in rei veritate* there was a Principal, unless it so appears by Judgment of the Law, and that is the Reason that when the Principal is pardon'd, or takes his Clergy before Judgment, that the Accessory shall never be arraign'd, for it don't appear by Judgment of the Law that he was Principal, and the Acceptance of the Pardon, or praying of the Clergy is an Argument, but no Judgment in Law that he is guilty: But if the Principal after Attainder, is pardon'd, or has his Clergy allow'd, there the Accessory shall be arraign'd, because it appears judicially that he was Principal.

JOHN Goff (d) Brother and Heir of *R. Goff*, brought Appeal of Murther of the said *R. G.* against *Bibthe* as Principal, and against *Hoell David* as Accessory before, and against *David ap Thomas* as Accessory after; the Principal pleaded not guilty, and by *Nisi prius* in the County of *Monmouth*, he was found guilty of Manslaughter, and not guilty of Murther, and had his Clergy: And upon this Matter, first it was resolv'd by *Poph. C. J.* & *per tot' Cur'* in *B. R.* that *Hoell David* was

was discharg'd, because he could not be accessory before the Fact in Case of (a) Manslaughter, for Manslaughter ought to ensue upon a sudden Debate or Affray, for if it is premeditated it is (b) Murther. 2. It was resolv'd, that altho' the Principal (c) was convicted by Verdict, yet forasmuch as he had his Clergy before Judgment, so that it don't appear judicially, s. by Judgment of the Law that he was a Principal, therefore and for the Causes alledged in *Syer's Case*, it was awarded, that both the Accessories, as well before as after should be discharged. The same Law, if the Principal upon his Arraignment confesses the Felony, and before Judgment obtains a Pardon, or has his Clergy allow'd, the Accessory thereby is discharg'd, *Vide* 2 E. 3. 27. 22 E. 3. *Corone* 260. 7 H. 4. 16. 10 H. 4. 5. 3 H. 7. 1. b. & 3 H. 7. *Corone* 53. And upon divers disagreeing Opinions, you will understand the Law, as here it was adjudg'd upon Consideration of all the Books.

William Vaux at the Sessions of Peace for the County of Northumb. held 27 Julii, anno 32 Eliz. before the Justices of Peace of the same County, was indicted of voluntary poysoning of *Nicholas Ridley*, which Indictment was remov'd into the *Kings Bench*: And in Discharge thereof the said Vaux pleaded, That at another Time, scil. 12 Augusti anno 30 Eliz. at *Newcastle upon Tyne* in the County of *Northumberland* before the Justices of Assise of the same County the said Vaux was indicted; *Quod cum Nich' Ridley nuper de W. in com' prad' Armig' jam defunctus, per multos annos, ante obitum suum nuptus fuisset cuidam Margareta uxori ejus & nullum exitum habuisset, prad' Will' Vaux nuper de K. in com' C. generos. subdole, caute, & diabolice intendens mortem, Venenationem, & destructionem ipsius Nicholai, & Deum pre oculis non habens, 20 Decembris anno 28 Eliz. apud W. pradict' felonice, (a) voluntarie, & ex malitia sua praecongiata, per suadebat eundem Nichol' recipere & bibere quendam potum mixtum cum quodam (b) veneno vocat' (c) Cantharides, affirmans & verificans eidem Nich' qd' prad' potus sic mixtus cum prad' veneno vocat' Canth' non fuit intoxicatus (Anglice poyson'd) sed quod per reception' inde prad' Nich' exiit de corpore dictae Margareta tunc uxoris suae procuraret, & haberet, ratione cujus quidem persuasione & instigationis prad' Nich' postea, scil. 16 Januarii anno supradicto apud T. in com' N. prad' nesciens pradict' potum cum veneno in forma pradict' fore mixt', (d) sed fidem adhibens pradict' persuasione dicti Willielmi recepit & bibit, per quod pradictus Nicholaus immediate post receptionem veneni pradicti per tres horas im-*

(a) Moor 461.
Halespl. Cor. 217.
(b) Co. Lit. 287. b
3 Inst. 55. b.
(c) 3 Inst. 114. 139.
11 Co. 35. a.
Cr. El. 541.
Antea 43. b.

IO.
Pasch' 33 El.
Vaux's Case in
B. R.

(x) Cr. Jac. 438.

(b) 3 Inst. 48.

(c) Palm. 547. 548.

(d) 1 Vent. 245.

Cases of Appeals and Indictments PART IV.

(a) Cr. JāE. 438. *mediate sequenti' languebat, & postea præd' 16 Jan. anno supra-
dicti ex venenatione & intoxicat' præd' apud T. præd' (a) obiit :*
Et sic præd' Will' Vaux felonice & ex malitia sua præcogitata
 (b) 5 Co. 123. a. *præfat' Nich' voluntarie & felonice modo & forma præd' intoxi-
cavit, interfecit, (b) & murtheravit, contra pacem, &c. Upon*
 which Indictment the said Vaux was arraign'd before the
 same Justices, and pleaded not guilty : And the Jurors
 gave a special Verdict, and found, *Quod præd' Nich' Ridley*
venenatus fuit, Anglice, poisoned, per receptionem præd' Can-
tharides, & quod præd' Will. Vaux non fuit præsens tempore quo
præd' Nich' Ridley recepit præd' Canth' sed utrum, &c. And
 thereupon Judgment was given by the said Justices of Assise in
 this Manner ; *Super quo visis, & per Cur' hic intellectis omnibus*
& singulis præmissis, pro eo quod videtur cur' hic super tota ma-
teria per veredictum præd' in forma præd' compert', quod præd'
venenatio per reception' præd' Canth' & præd' procuratio præd'
Will' ad procurand' præd' Nich' ad accipiend' præd' Canth' modo
& forma prout per veredict' præd' compert' fuit, non fuit feloniam
& murtherum voluntar' : Ideo considerat' est quod præd' Will' Vaux,
de feloniam & murthero præd' in indictamento præd' superius speci-
ficat', necnon de dicta feloniam venenatione præd' Nich' Ridley in
eodem Indictamento nominati eidem Will' impositi eat sine die :
 And as to the Felony and Murder he pleaded not guilty.

And first, it was resolv'd *per totam Curiam*, That the said
 Indictm. upon which Vaux was arraign'd was insufficient, and
 principally, because it is not expressly alledg'd in the Indict-
 ment, that the said Ridley receiv'd and drunk the said Poi-
 son, for the Indictment is, *præd' Nich' nesciens præd' potum cum*
veneno fore intoxicatum, sed fidem adhibens dicti per suasioni dicti
W. recepit & bibit, per quod, &c. So that it doth not appear
 what thing he drunk, for these Words (*venenum præd'*) are
 wanting, and the Words subsequent, *scil. per quod præd' N.*
immediate post receptionem veneni prædicti, &c. which Words
 imply Receipt of Poison, are not sufficient to maintain the
 Indictment, for the Matter of the Indictment ought to be
 full express, and certain, and shall not be maintain'd by
 Argument, or (c) Implication, because the Indictment is
 found by the Oath of Laymen. 2. It was agreed *per Curiam*,
 That Vaux was a principal (d) Murderer, altho' he was
 not present at the Time of the Receipt of the Poison, for
 otherwise he would be guilty of such horrible Offence, and
 yet should be unpunish'd, which would be inconvenient and
 mischievous ; for every Felon is either principal or accessory,
 and if there is no Principal there can be no Accessory, *quia*
 (e) *accessorium sequitur principalem*, and if any had procu-
 red Vaux to do it, he had been accessory before ; *quod*

nota

(c) Stamf. Cor.
96. a. b.

(d) 2 Inst. 183.
3 Inst. 43, 138.
9 Co. 81. b.
10 Inq. Cent. 290.

(e) Co. Lit. 152. a.
Palm. 434.
Larch. 27.

nota a special Case, where the Principal and Accessory also shall both be absent at the Time of the Felony committed. 3. It was resolv'd by the Lord *Wray*, *Sir Thomas Garway*, *Clench* & *Fenner* Justices, that the Reason of *Auterfoits acquit* was, because where the Maxim of the Common Law is, That the Life of a Man shall not be twice (a) put in Jeopardy for one and the same Offence, and that is the Reason and Cause that *Auterfoits* acquitted or convicted of the same Offence is a good Plea, yet it is intendable of a (b) lawful Acquittal or Conviction, for if the Conviction or Acquittal is not lawful, his Life was never in Jeopardy; and because the Indictment in this Case was insufficient, for this Reason he was not *legitimo modo acquietatus*, and that is well prov'd, because upon such Acquittal he shall not have an Action of (c) Conspiracy, as it is agreed in 9 E. 4. 12. a. b. vide 20 E. 4. 6. And in such Case in Appeal, notwithstanding such insufficient Indictment, the Abbettors shall be enquir'd of as it is there also held; and altho' the Judgment is given that he shall be acquitted of the Felony, yet this Acquittal shall not help him, because he was not *legitimo modo acquietatus*; and when the Law saith, that *Auterfoits acquitted* is a good Plea, it shall be intended when he is lawfully acquitted; and that agrees with the old Book in 19 E. 3. *Corone* 444. (d) where it is agreed, if the Process upon Indictment or Appeal is not sufficient, yet if the Party appears (by which all Imperfections of the Process are sav'd) and is acquitted, he shall be discharg'd; but if the Appeal or Indictment is (e) insufficient (as our Case is) there it is otherwise: But if one upon an insufficient Indictm. of Felony has Judgment *qd' suspend' per coll.*, and so attainted, which is the Judgment and the End which the Law has appointed for the Felony, there he can't be again indicted and arraign'd till this Judgment is revers'd by (f) Error: But when the Offender is discharg'd upon an insufficient Indictment, there the Law has not had its End, nor is the Life of the Party in the Judgment of the Law ever in Jeopardy, and the Wisdom of the Law abhors that great Offences should go unpunish'd, which was grounded without Question upon these ancient Maxims of Law and State: *Maleficia non debent remanere impunita, & impunitas continuum affectum tribuit delinquendi, & minatur innocentes qui parcat nocentibus*: So if a Man is convicted either by Verdict, or by Confession upon an insufficient Indictment, and no Judgment thereupon given, he may be again indicted and arraign'd, because his Life was never in Jeopardy, and the Law wants its End: And afterwards upon this new Indictment the said *Vaux* was try'd and found guilty, and had his Judgment, and was hang'd.

(a) Postea 47. 2.
Antea fol. 40. a.
1 Bullfr. 142.

(b) 3 Inft. 224.
Cr. Car. 147.
20 H. 7. 12. a.

(c) 3 Inft. 143.
Palm. 45.
Bridgm. 132.
Br. Conspiracy 23

(d) 1 Bullfr. 142.
Stamf. Cor. 106. a.
F. N. B. 115. 5.
Palm. 39.

(e) Hal. pl. Co. 244.
Postea fo. 47. a.
Stamf. Cor. 106. a.
Doct. pla. 36, 67.
3 Inft. 214.
Hales pl. Co. 247
2 Leon. 160.

(f) Hales pl.
Cor. 247.

Cases of Appeals and Indictments. PART IV.

Catherine late the Wife of *Robert Wrote* brought an Appeal of the Murder of her Husband against *Thomas Wigges*, and declared, that the said *T. Wigges* at *Shepperton* in the County of *Middlesex* 23 *Septemb'* anno 31 *Eliz.* of his Malice forethought feloniously struck, &c. whereof the said *Rob. Wrote* died 24 *Septemb.* then next following, &c. and so the Def. murder'd him the 24 *Septemb'* aforesaid. The Defendant pleaded that he himself heretofore 8 *Octob'* anno 31 *Reg. Eliz.* at *Shepperton* aforesaid by an Inquisition there then taken before *William Danby* then Coroner of the Queen's Household, and *Iron Chaukill* then one of the Coroners of the said County of *Midd'* upon the View of the Body of the said *Rob. Wrote* by the Oath of 12 Men (and shewed their Names) of the said County of *Midd'* was presented, That the said 23 *Sept.* 31 *Eliz.* at *Sheperton* aforesaid, the said *Rob. Wrote* feloniously did strike, &c. whereof he died the 24 *Sept.* following, and so indicted him of Manslaughter, which Inquisition afterwards 23 *Septemb'* 32 *Eliz.* at *London* in the Parish of *St. Sepulchres*, the said *Iron Chaukill* then one of the Coroners of the said County of *Midd'* at the Gaol-delivery at *Newgate*, made for the said County of *Midd'* there, viz. at Justice-Hall in the *Old Bailey*, before *John Hart* then Mayor of the City of *London*, and other Justices of Gaol-delivery of Prisoners in the said Gaol of *Newgate* being delivered and certified; upon which the said *Thomas Wigges* then under the Custody of the Sheriffs of *London* was brought to the Bar; and there then the said *Thomas Wigges* being arraigned upon the said Indictment, confessed the Felony, and prayed his Clergy; and the Book being delivered to him he read as a Clerk as by the said Record appears, and said that no Judgment was given thereupon; and averred, that *Shepperton* at the Time of the said Inquisition, and Stroke and Death was within the Verge of the Queen's Household, and pleaded over to the Felony, &c. And it appeared that the said Arraignment and Confession and Allowance of the Clergy was after the Purchase of the Writ of Appeal * and before the Return of it, Upon which Plea in Bar the Pl. demurr'd in Law. And after many Arguments, and great Deliberation, it was adjudged against the Def. And in this Case six Points were resolved. 1. That *Anterfois* (a) Convict of Manslaughter, and Clergy thereupon allowed was a good Bar in an Appeal of Murder, and so was it adjudged in an Appeal in *B. R.* between *T. Burghe* Esq; Broth. and Heir of *H. Burghe*, and *T. Holcroft* (b) Esq; *Pasch.* 20 *Eliz.* of the Murther of the said *H.* where the Def. pleaded, that at *Hampton* Court in the Parish of *Hampton* in the County of *Midd'* within the Verge, by an Inquisition taken before *R. Vale* then Coroner of the Queen's Household and one of the Coroners *Com' Midd'*

II.

Mich. 33 & 34
Eliz. Wrote v.
Wigges Cr.
Eliz., 296.

* Antea 47. b.

(a) Yelv. 205.
Antea 40. a.
16 E. 4. 11. 2.

(b) 3 Inst. 131.
2 Leon 83, 160,
161. 1 Anderl.
68. Co. Entr.
53. b. pl. 4.

super

super visum corporis, the Def. was indicted of the Manslaughter of the said Henry within the Verge; upon which Indictment the Def. was arraigned before Commissioners of Oyer and Terminer in the County of Middl' and confessed the Indictment, and prayed his Clergy, and thereupon *Curia ad visare vult*, and demanded Judgment of the Appeal; and in that Case two Points were resolved. 1. That that Indictment was well taken, and within the Stat. of *Articuli super chartas cap. (a) 3.* by which it is enacted, That in Case of the Death of a Man within the Verge, it shall be commanded to the Coroner of the County, that he with the Coroner of the King's Household, shall do as belongeth to his Office. And altho' it was objected, That the Stat. requires two Persons, *s.* two Coroners to do the Office which appertains in this Case; and in the Case at Bar there was but one Person, altho' he had two several Offices, *s.* Coroner of the Household, and one of the Coroners of the County, and when the Law gives Authority to two Persons, one only can't execute it; for *(b) Securius expediuntur negotia commissa pluribus, & plus vident (c) oculi quam oculus, & una (d) persona non potest supplere vicem duarum:* Yet in this Case of several Authorities, it was resolved that the Indictment was well *(e)* taken, for the Intent and Meaning of the Act was performed, and the Mischief recited in the Act avoided as well when one Person is Coroner of the Household, and of the County also, as if there should be two several Persons, for altho' the Court removes, yet he as Coroner of the County may proceed, &c. 2. Where it is provided by the Stat. of 3 H. 7. *(f) cap. 1. That if it fortune that the Felons, Murderers, and Accessories, or any of them be acquitted upon Indictment, or the Principal attainted, &c. the Wife or next Heir to him so slain, may have their Appeal against the Persons so acquitted, or against the Principals so attainted, if they be alive, and that his Benefit of his Clergy thereof before be not had;* (for at that Time Clergy was allowed for Murder.) It was resolved that the Bar was good at the Common Law not restrained by the said Act, because if the Def. had had his Clergy, then without Question the Appeal wou'd not lie; for if the Offender is attainted, and has his Clergy, it is excepted out of the Act and left to the Common Law; *a fortiori* when he is but convicted thereof and prays his Clergy, and the Act of the Court (to be advised as to the Allowance of Clergy) shall not *(g)* prejudice the Party in Case of Life: but it was resolved, that these Words (*Attainted of Murder*) in this Act shall not be intended only of a Person who has Judgment of Life, but also extend to a Person convicted by Confession, or Verdict; for a Person attainted is a Person convicted and more, *& (h) omne majus continet in se minus;* and if the Stat. should not extend to Persons convicted all the Purview of the Act wou'd be overthrown. And in the Statute of 25 E. 3. *cap. 2.* it is said attainted by Verdict, which is as much as to say, convicted by Verdict, and

(a) 6 Co. 12. 2.

20. b. 10 Co.

69. b. 74. a.

3 Keb. 335.

2 Inst. 547. 548.

3 Inst. 134. Cro.

El. 502. 1 Bullt.

208, 209, 210,

211, 212. 2 Leon.

160. 5 E. 4.

129. a. Br. Action

sur le Statute

38, 49. 10 H. 6.

13. a. Registr.

185. a. 191. b.

F. N. B. 241.

Rast. Ent. 433. a.

(b) 11 Co. 3. b.

4. a.

(c) Lit. Rep. 96.

(d) Cawly 209.

(e) 3 Inst. 134.

(f) 3 Inst. 213.

131. Stamf. Cox.

106. b. 107. a.

1 Jones 145.

F. N. B. 115. h.

(g) 3 Inst. 134.

(h) 2 Co. 68. a.

5 Co. 115. a.

6 Co. 43. b.

3 Inst. 109. Co.

Lit. 52. b. 285. a.

1 Bullt. 105.

2 Bullt. 48.

Cases of Appeals and Indictments. PART IV.

many Times in common Speech a Person convicted is called a Person attainted; & (a) *loquendum est ut vulgus*: Also it would be hard that the Law should enable the Party to appeal against a Person acquitted, who by Judgment of the Law is innocent, and should not enable him against one who is convicted who is found guilty: And in that Case it was said that it was adjudged in the Case of one *Agnes Gainsford*, that where the said Act of 3 H. 7. cap. 1. is. *That the Wife, or Heir of him so slain shall have the Appeal*; That the Heir of a Wo. who was murd. shall have Appeal against one who was acquit. of the same Murd. for (b) *apices juris non sunt jura*: And it was resolved without Diffic. in *Holcroft's Case*, that if a Man commits Murder, and is indict. and convict. or acquit. of Manlaugh. he shall never answer to any Indict. of the same Death, for all is one and the same Felony for one and the same Death, altho' Murder is in Respect of the Circumstance of the Forethought Malice more odious; and therof. in an Indictment, or Appeal of Murder, he may be found guilty (c) of Manslaughter. 2. It was resolved in the Case at Bar, That at Com. Law the Coroner of the K's House has an exempt Jurisdiction within the Verge; and that the Coroner of the County can't intermeddle therein; and that well appears by the Preamble of the said Stat. of *Articuli super chartas*; And forasmuch as heretofore many Felonies committed within the Verge have been unpunished (and the Reason and Cause thereof was) because the Coroners of the County have not been authorised to enquire of such Manner of Felonies done within the Verge, but the Coroner of the King's House which never continueth in one Place, by Reason whereof there can be no Trial made in due Manner, nor the Felons put in Exigent, nor Outlawed, nor any Thing presented in the Circuit, the which hath been to the great Damage of the King, and nothing to the good Preservation of his Peace: By which it appears, that at Common Law the Coroner of the County could not intermeddle with the Death of a Man within the Verge, but the Coroner of the Household only, and so was it adjudged *Pasche 24. Eliz.* in *B. R.* where *Swift* was indicted before the Coroner of the County of *Middlesex* of a Murder committed at *Tuthil* in *Com' Midd'* which Indictment was removed into *B. R.* and there *Swift* pleaded, That *Tuthil* was at the Time of the Murder, and yet is within the Verge, &c. upon which the Queen's Attorney demurr'd in Law, and it depended in Advise-ment 3 Terms, and at length the Plea was adjudged good, and thereupon he was discharged of the Indictm. for as the Coroner of the Houh. can't intermeddle within the County out of the Verge, because his Office extends not to it, so the Coroner of the County can't intermeddle within the Verge; for that was exempted out of his Office by the Common Law, and it would be against Reason that their Offices and Jurisdictions being several that the one should intermeddle within the Jurisdiction of the other. But it was resolv'd, that the Justices (d) *B. R.* Justices of Oyer and

(a) 3 Keb. 20.
Cart. 120. Heli.
101. 2 Roll. Rep.
239.

(b) 6 Co. 65. 2.
10 Co. 126. a. Co.
Lit. 283. b.
304. b. Noy. 30.

(c) Cro. El.
276. 296. 464.
465. Antea 40. a.
Larch. 126.
O. Bendl. 144.
2 Roll. Rep. 461.
Moor 407.
Britton lib.

(d) 2 Inst. 549.

Terminer, Gaol-delivery, (a) and Justices of Peace, may enquire of, hear and determine all Murders and Felonies within the Verge, because their Authority and Jurisdiction are general thro' the whole County, and so always it has been used, and so it was adjudged without Scruple in *Holcroft's Case*. 3. It was resolved, That the Indictment was insufficient, for by the said Indictment taken before the Coroner of the Household, and the Coroner of the County, it appears that the Stroke and the Death were at *Shepperton* in *Com' Midd'* and it doth not appear in the Indictment that *Shepperton* was within the Verge, *scil. (b)* within 12 Miles of the Lodging of the King in his Court; and altho' in Truth it was within the Verge, yet the Indictment being (c) *veredictum*, *i. e. dictum veritatis*, and Matter of Record ought to import all the Truth which is requisite by Law, for *de (d) non apparentibus & non existentibus eadem ratio*, and every Part of the Indictment material ought to be found by the Oath of the Indictors, and can't be (e) supplied by bare Saying or Averment of the Party; and because it doth not appear within the Indictment that *Shepperton* was within the Verge, for this Cause the Indictm. taken before the Coroner of the Household, and the Coroner of the County is insufficient; for it doth not appear that the Coroner of the Household had any Authority to take it, and it shall not be as void and *coram non Judice* as to the Coroner of the Household, and good before the Coroner of the County, for the Record is intire, and the Indictment taken before both intirely, and perhaps the Jury was directed principally by the Coroner of the Household, and the Witnesses examined and sworn by him, altho' all is recorded and enrolled in both their Names: Also the Def. has averred in his Plea that *Shepperton* was within the Verge, so that the Coroner of the County as appears by the Confession of the Def. himself could not take it solely. 4. It was resolved, That for as much as the Indictment upon which he was convicted was (f) insufficient, notwithstanding such Conviction, he may be indicted and arraigned again, or appealed of the same Offence, because his Life in Judgment of the Law was never in Jeopardy as it was resolved in *Vaux's Case* before, *Pasch.* 33 E. 5. It was resolv'd *per tot' Cur'*, that where the Stroke was given the 23 Day of *Sept'* and the Death followed the 24 Day; and concludes that the said *T. Wiggess* murdered the said *Rob.* Wrote the (g) 24 Day, that it was good enough, for it was not Murder before; but to conclude that he murdered him the 23 Day was repugnant, as it was resolved before in *Heydon's Case*, *Trin.* 28 *Eliz.* But it was resolved that the finding of the Stroke, and the Death was not sufficient by itself without making Conclusion, that is to say, and so the said *Tbo. Wiggess* murder'd the said *Rob.* Wrote, &c. 6. It was resolv'd, That tho' the Conviction was (h) pending the Appeal

(b) 10 Co. 72. b.
74. a. F. N. B.
241. b. 13 R. 2.
c. 3. 27 H. 8.
c. 5 & 33 H. 8.
c. 12.
(c) Co. Lit.
226. a.
(d) 5 Co. 5. b.
Cawdry's Case.
Vaugh. 72.
12 Co. 52. 2 Inft.
20. Palm. 15.
Bulstr. 110.
Hob. 295.
(e) 5 Co. 120. b.
22 E. 4. 12.

(f) Hales pl.
Cor. 244, 247.
Stamf. Cor.
106. a. Doct. pla.
36, 37. 3 Inft.
214. Antea 45. a.
(g) Antea 42. b.
2 Inft. 318, 320.
3 Inft. 53. Cro.
El. 196, 739.
Dyer 50. pl. 9.
10. Stamf. 63. a.

(h) 1 Jones 145.

Cases of Appeals and Indictments. PART IV.

(a) Antea 45. b.
1 Jones 145.

yet if it had been (a) lawful, and before the Def. was compell'd to plead, it had been a good Bar. And afterwards *Wigges* was tried in *B. R.* and upon his Trial, the Queen's Attorney was of Council with him, (because it was a Subject's Suit) and *Wigges* was found Not guilty of the Murder.

12.

Hill 45 Eliz. in
B. R. Wait's
Case.
(b) Jenk. Cent.
29. 2 Inst. 183.

THE Wife of *William* (b) *Waits* Gent' brought an Appeal of Murder of her Husband against divers; and afterwards she brought another Appeal against others; and in all she had brought seven Appeals of the said Murder against several Persons as Principals; And it was resolved by *Popham G. J. & totam Curiam*, That all the said Appeals but the first ought to abate; for without any Difficulty all the Principals and Accessories before the Murder, and also all Accessories after, and before the Writ purchased, against whom the Pl. would bring Appeal ought to be named in one Writ, and not in divers. (c) 9 H. 4. 1. The Wife of *Tho. Goter* brought an Appeal of Death against *Tho. Walton*, and two others, *Walton* only appeared, and the others made Default. The Pl. declared against all three, that is to say, two as Principals, and against the other as accessory: *Walton* pleaded, That at another Time the said Woman made an Appeal of the same Death before certain Justices of Gaol-delivery in the County of *N.* against one Man as Principal of the same Death, who at her Suit before the said Justices was attainted and hang'd, and demanded Judgment of the Writ, and pleaded over to the Felony: And it was said by the Pl's Council that her Writ ought not to abate, because in her Appeal before the said Justices of Gaol-delivery, she could not charge any, nor could the Justices of Gaol-delivery make Deliverance of any who then was not in Prison in the Gaol before them, and that *Walton* and the others now Defts. then were at Liberty, and therefore it was impossible to joyn them in the said Appeal before the said Justices of Gaol-delivery, and so no Default in the Pl. But it was adjudg'd, that the Writ should abate, and in the same Case 3 Points were resolved. 1. That the Pl. ought to have made her Appeal against all, and afterwards to have removed it by Writ before us in this Place. 2. That the Wife should not have (d) two Appeals of Death in this Place, but ought to join all (whom she will charge) in one and the same Writ. For if one brings an Appeal of Death against divers and all but one make Default, yet the Pl. ought to declare against all; and by the same Reason that he shall be driven to (e) declare against all, he ought to bring his Appeal against all. 3. That in that Case the Defendant should not have (f) Damages by the Statute of *W. 2. cap. 12. quia extra casum Statuti*, because the Writ abated. *Vide 28 E. 3. 90. a.* (g) A Woman brought an Appeal of the Death of her Husband against the principal Doer, and the principal

(c) Jenk. Cent.
29. pl. 56. 9 H. 4.
1. b. 2. a. Fitz.
Coron. 77. Br.
Appeal. 28.
Kelw. 83. pl. 4.
Stamf. Cor.
65. b.

(d) 47 E. 3. 16. b.
Br. Appeal 14.
Fitz. Coron.
104. Dyer 39. pl.
58. Jenk. Cent.
29. 2 Inst. 183.
7 Co. 2. b. Bul-
wer's Case.
Kelw. 83. pl. 4.
Hales pl. Cor.
188. Stamf. Cor.
65. b.
(e) Hales pl.
Cor. 188.
(f) Stamf. Cor.
65. b. Fitz. Co-
rone 138.
(g) Stamf. Cor.
109. a.

(d) two Appeals of Death in this Place, but ought to join all (whom she will charge) in one and the same Writ. For if one brings an Appeal of Death against divers and all but one make Default, yet the Pl. ought to declare against all; and by the same Reason that he shall be driven to (e) declare against all, he ought to bring his Appeal against all. 3. That in that Case the Defendant should not have (f) Damages by the Statute of *W. 2. cap. 12. quia extra casum Statuti*, because the Writ abated. *Vide 28 E. 3. 90. a.* (g) A Woman brought an Appeal of the Death of her Husband against the principal Doer, and the principal

PART IV. *Cases of Appeals and Indictments.*

48.

Affidants and Doers, and sued another Appeal against the Receivers, and the Book saith, That the two Appeals were maintainable, notwithstanding the Statute gives that all shall be in one Writ, which are the Words of the Book, in which the Statute intended is the Statute of *Magna Charta*, c. 34. by which it is enacted, That (a) *Nullus capiatur propter appellum femina de morte alterius quam viri sui*: And because the Statute saith *Appellum* in the singular Number, it was collected that all ought to be named in one Writ; which Book, if it can be maintained for Law, ought to be intended of Accessories after the first Appeal brought, which could not be named in the first Appeal. *Vide* 26 (b) *Aff.* 52. (b) Jenk. Cent. 29. Stamf. Cor. 65. b. Fitz. Coron. 196 Br. App. peal 65.

I*nquisitio capti ad Sessionem pacis, &c. in Com' Surr', tent' die Martis & die Mercurii, &c.* and recites the Statute of Hill 13. 30. Eliz. (c) 8 H. 6. of *Forcible Entry*, and misrecites it in some Points; and this Indictment was quashed for two Reasons: 1. Altho' the Sessions might last two or three Days, yet the Record ought to mention, that the Sessions were held at one certain (d) Day: 2. Also because the Statute of 8 H. 6. (d) Palm. 44. was misrecited in a material Point: *Know Reader*, it is not Policy in such Indictments to (e) recite the said Act of (e) Cro. El. 96. 307, 697. 8 H. 6. for the Recital thereof is not necessary, and Misrecital thereof is fatal to the Indictment, and therefore the sure Way is to draw the Indictment with Conclusion, (f) (f) Aleyn 50. *contra formam Statuti, &c.* and with no Recital of the Act.

Hill.

Hill. 29 Regina ELIZ.

In Communi Banco.

ANDREW OGNEL's Case.

Vaughan 40.
 1 And. 178.
 4 Leon. 115, 116.

IN a Replevin between Andrew Ognel Plaintiff, and Thomas Underhill, and Henry Appelby Defendants: The Case was, William Rainsford anno 4 E. 6. possess'd for 30 Years of a Farm called *Crewelfield Grange*, which consisted of divers Parcels known by several Names, *scil. Hobbes-field, Park-field*, and divers others, made his Will, and thereof appointed Hercules his Son his Executor, who 3 & 4 Ph. & Mar. demised all the Grange, (except *Hobbes-field*) to one Henry Bere for 23 Years; and demised *Hobbes* to Walter Frecleton for 23 Years; and afterwards granted all the Residue of his Term in the whole Grange, to the said Henry Bere and Frecleton; he in the Reversion in Fee anno 13 El. Regina, by his Deed granted a Rent-Charge in Fee issuing out of all his Lands and Tenements, *communiter vocat Crewelfield Grange, quondam in tenura Will' Rainsford, & adiunc in tenura & (a) occupat' Henrici Bere vel assignator' suorum*. The Rent is behind, the said Term for 30 Years expires, he in Reversion makes a Feoffment in Fee of the said Farm to another, the Grantee makes his Executors and dies, the Feoffee makes a Lease at Will, the Executors of the Grantee distrein for the Rent arrear in the Life of the Grantee before the Expiration of the Term; and Judgment was given for the Executors against the Plaintiff. And in this Case three Points were resolv'd, *s. two at the Common Law, and one upon the Statute of 32 H. 8. cap. 37.*

The first Point was, That at the Common Law there was Difference between Annuity in Fee, and Rent-Service, Charge, or Seck; for in Case of Annuity altho' it continues, yet in some Case an Action of Debt may be maintainable for the Arrearages; as if (b) a Parson or Prebendary, &c. has an Annuity, and the Annuity is arrear, and Parson or Prebendary, &c. relinqs he shall have an Action of Debt for the Arrearages;

fo

(a) Postea 49. b.
 F. N. B. 121. D.
 Poph. 87.

So if the Parson or Prebendary dies, his ^(a) Executors shall have an Action of Debt for the Arrears incurr'd in the Life of his Testator, because the Person of him who ought to pay the Annuity, is chargeable in a Writ of Annuity: But otherwise it is in Case of Rent, be it Rent Service, Rent Charge or Seck, for when the Rent continues of any Estate of Freehold, no Action of Debt lies for the ^(b) Arrearages: Also at the Common Law great Difference appears when Rent in Fee is extinct either by Act in Law, or by Act of the Party, and when particular Estates in Rents expire or determine: And therefore at the Common Law, if the Son be Lord, and the Father Tenant by certain Rent, the Rent is Arrear, the Tenant dies, and the Tenancy descends to the Son, in that Case the Rent is determin'd and extinct by Act in Law, and yet the Executors of the Lord shall not have an Action of Debt for the Arrears incurr'd in the Life of the Testator, because the Lord himself could by no Possibility have an Action of Debt for the Arrears, for the Tenure was all in the Realty, and the Tenant could not be charged in any Personal Action for them. But if a Woman is endow'd of a Rent, or if a Rent is granted for Life, and the Tenant attorns, the Rent is Arrear, and afterwards the particular Estate in the Rent determines by Death, the Executors of the Tenant in Dower, or of the Grantee for Life, shall have an Action of Debt by the Common Law for 2 Reasons. 1. Because by Possibility the Testator himself might have an Action of Debt, for if he had surrender'd his Estate to him in Reversion, he should have an Action of Debt for the Arrearages incurr'd before. 2. These particular Estates with the Attornment of the Tenant, or when the Law supplies Attornment, amount to a real Contract in Law, which Realty, when the Estate of Freehold is determin'd, dissolves itself into Personalty: And these are the true Differences as to this Point prov'd and approv'd in our Books; and therefore in 45 E. 3. *Executors* 71. where the Case was, that the Father granted a Rent Charge out of certain Lands to his Son in Fee, the Rent is Arrear, the Father dies, the Land descends to the Son, by which the Rent is extinct by Act in Law, the Son brings an Action of Debt against the Executors of the Father for the Arrears incurr'd in the Father's Life, and adjudg'd that for them (as Arrears of a Rent) no Action lies, but for the Arrears of an Annuity it was maintainable; and altho' by the Descent of the Land to the Grantee being Heir to the Grantor, as well the Annuity as the Rent was determin'd and that the orig. Election was annex'd to an Inheritance yet inasmuch as the Inherit. of both was determin'd by Act in Law, (which will do Wrong to none) it was therefore adjudg'd, That his Election should remain as to the said Arrears, which Election he has made by bringing the Action of Debt against the

^(a) F.N.B. 120. L.
Postea 49. b.^(b) 9 Co. 38. b.
Cr. El. 895.
1 Roll. 594.

Executors of his Father ; for the Book says, that the Son may choose whether he will have a Writ of Annuity or Distress, *ſc.* 4 E. 3. *Executors* 98. A Man makes a Lease for Life (a) rendering Rent, the Rent is Arrear, the Lessor dies, the Executors during the Life of the Tenant for Life shall not have an Action of Debt, but after the Estate for Life determin'd the Action shall be maintainable, 9 H. 6. 43. 14 H. 6. 26. 19 H. 6. 43. 32 E. 3. *Dette* 9. F. N. B. 121. C. So if Rent is granted for Life, or a Woman is endow'd of a Rent, the Executors of the Grantee, or of the Tenant in Dower shall have an Action of Debt by the Common Law, as appears by 32 E. 3. *Dette* 9. 34 H. 6. 20. * 9 H. 7. 17. But in the Case of 11 (b) H. 4. fol. ultimo, when Rent is granted for Life, and afterwards becomes Arrear, and afterwards the Tenant aliens, and afterwards the Grantee of the Rent dies, the Action shall be maintainable against him who was Tenant, and took the Profits when it was arrear. (c) 26 E. 3. 64. a. b. Sir Will. Loringe's Case. Sir William Loringe was Grantee for Life of a Rent out of the Moiety of a Manor, of which Moiety a Man was seised in the Right of his Wife, the Rent was Arrear ; Sir William Loringe dy'd, his Executors brought an Action of Debt against the Husband only for the Arrearages of the Rent, and there two Points are adjudg'd : One, that by the Death of Sir William Loringe, the Grant for Life was turn'd into Nature of Debt. 2. That forasmuch as the Husband took the Profits of the Land charg'd with the Rent when it was Arrear, that he only (without his Wife) shall be charg'd in an Action of Debt: And there it is held, that after the Death of the Husband the Action of Debt in such Case shall lie against his Executors. If there is Lessee for Life of a Manor, and the Rents are arrear, the Tenant for Life surrenders his Estate, he shall have an Action of Debt for the Arrearages : So if a Parson or a Prebendary, &c. who has an Annuity (d) resigns, he shall have an Action of Debt for the Arrearages incurr'd before the Resignation, 19 H. 6. 41. b. 43. F. N. B. 121. D. E. So if a Prebendary or Parson, &c. (e) dies, his Executor shall have an Action of Debt for the Arrearages incurr'd during his Life. *Vide* 4 H. 6. 31. 7 H. 6. 19. 8 H. 6. 7. 19 E. 3. * *Jurisdiction* 22. F. N. B. 120. l. The Executors of the Lord shall have an Action of Debt for (f) Relief, for it is but an Improvement of the Service, and so it was adjudg'd in 32 H. 8. Rot. 429. in *Leake's Case*: *Vide* 11 H. 6. 11. 11 H. 6. 18. 34 E. 1. *Avowry* 233. But the Lord himself shall (g) distress, and shall not have an Action of Debt, as it is said in 7 H. 6. 13. 22 *Aff.* 52. A Woman made a Lease for Life rendering the first 3 Years 100 s. and afterwards 40 l. during the first 3 Years she was disseised of the Rent, and brought an Assise, and adjudg'd maintainable, for in Judgment of Law all is but one Rent, altho' it is divided in Payment. *Vide* 15 E. 3. *Execution* 63. But it was resolved, in the Case at Bar, that the Arrears due in the Life of the Grantee

(a) Dy. 375. pl. 20.

* 7 Co. 38. b.
(b) Co. Lit. 162. b.

(c) Co. Lit. 162. b.
Fitz Det. 180.
Postea 51. a.

(d) Antea 48. b.
Poph. 87.
Br. Det. 94.

(e) Antea 49. a.
Co. Lit. 162. b.

(f) Co. Lit. 47. b.
83. b. 162. b.
3 Co. 66. a.
Dall. 17. pl. 6.
1 Roll. 596, 665,
215. Dy. 24. pl. 149
Dy. 140. pl. 37.
B. N. C. 176.
Br. Det. 194.
Br. Relief 11.
Noy 43, 44.
O. Benl. 10.
(g) Co. Lit. 47. b.
83. a. 162. b.
Dall. 17. pl. 6.
1 Roll. 596, 665.
Br. Det. 194.
Br. Relief 11.
Kclw. 133. pl. 111.

were lost at Common Law. The second Point resolv'd was, That *Hobbesfield* was not charged with the said Rent by Reason of these joyn't Words; for altho' it is Parcel of *Crewel-field-Grange*, and that *Henry Bere* and *Frecleton* had the Reversion of the Term, and so the Land might be said in their Tenure; yet forasmuch as *Henry Bere* had not then *Hobbesfield* in his Occupation, *Hobbesfield* is out of the said Words, by Reason of the said last Clause, *scil. & adtunc in tenura & occupatione Henrici Bere*. So that by Reason of the Conjunctive, which joyns the Tenure and (a) Occupation together, nothing is charg'd, but so much of the said *Grange* only as was in the Tenure and Occupation of *Henry Bere*, and that was not *Hobbesfield*; vide for the Exposition of this Conjunctive (Et) (b) 19 H. 6. 4. a. b. & 9 E. 4. (c) 42. b. in the Case of a Release. The third Point resolv'd was upon the said Statute of 32 H. 8. (d) cap. 37. And the Doubt arose upon these Words: *And it shall be lawful to every such Executor, &c. of any such Person or Persons to whom such Rent or Fee Farm is or shall be due and not paid at the Time of his Decease, to (e) distress for the Arrearages of all such Rents upon the Lands, &c. So long as the said Lands, Tenements, or Hereditaments, continue, remain, or be in the Seisin or Possession of the said Tenant in Demesne, who ought immediately to have paid the said Rent, &c. be in the Seisin or Possession of any other Person or Persons claiming the said Lands, Tenements, and Hereditaments, only by and from the said Tenant, by Purchase, Gift, or Descent, in like Manner and Form as their said Testator might or ought to have done in his Life.* And it was objected, that this Case was out of the said Act, for the said Act extends only to Tenants in Demesne who immediately ought to have paid it, and that was in the Case at Bar, the Grantor and those who claim only by and from him; and in this Case Lessee at Will of the Feoffee doth not claim only by and from the Grantor, but he claims by and from the Feoffee, and so out of the Statute. And therefore it was said, That the Feoffee of the Feoffee, and so in *infinitum*, is out of the said Act; and so, it was said, have like Statute, been construed which are *stricti Juris*, because they restrain the Common Law, as *W. 2. cap. 40. (f)* in *Cui in vita* if the Vouchee vouches over one within Age the Parol shall demur, as it is adjudg'd in 18 E. 4. 16. a. So there it is said, upon these Words (*expectet emptor*) that the Feoffee of the Feoffee is out of the said Act. 16 E. 3. Age 47. agrees to the Case of 2 Feoffee 16 E. 3. Age 2. But it was adjudg'd, that altho' the Lessee at Will doth not claim immediately from the Grantor, yet he is within the said Act; for where Things are due in Right and Truth, and become remediless by the Act of God, *s.* by the Death of him to whom they were due, in such Cases Acts of Parl. which give Remedy

(a) Hob. 177.
 2 Roll. Rep. 265.
 226. Palm. 320.
 4 Leon. 113.
 Lit. Rep. 23, 63.
 Cr. Car. 130, 144.
 473. Godb. 237.
 173. Godb. 237.
 173. Godb. 237.
 Co. Lit. 249. b.
 1 And. 178.
 1 Leon. 21.
 (b) 5 Co. 7. b.
 (c) 5 Co. 7. b.
 Fitz Release 14.
 Br. Release 29.
 (d) Co. Lit. 102. a.
 1 Leon. 302, 303.
 3 Leon. 59, 263.
 (e) 5 Co. 116.

(f) 1 Co. 15. a.
 Plowd. 17. b. 47. a.
 2 Inst. 455.
 2 Leon. 148.
 6 Co. 5. a.
 2 Roll. Rep. 246.
 Br. Age 43.
 46 E. 3. Age 76.
 7 E. 2. Age 139.
 14 H. 7. 18. b. 19. a.
 6 E. 3. 216. b.

in such Cases, God forbid that they should not have a benign and favourable Interpretation, and extend to advance the Remedy proportionably to the Mischief and Defect of the Law, according to the Intent and Meaning of the Makers of the Act. And therefore the second Feoffee, and so over *in infinitum*, shall be charged by Force of this Act, for what Reason will there be to bind the first Feoffee, and not the second Feoffee, and so all others? And what Reason will there be to bind only the immediate Heir who shall have it by Descent, and not any other mediate Heir? For otherwise as to this Point the Statute will serve to little Purpose, and especially when the first Feoffee may alien the Land at his Pleasure; and all the Sons of Adam are subject to Death: Some also conceiv'd, that the second Feoffee is within the express Words of the Act, for altho' he is not *in by the Grantor*, yet he is *in from him*, for *from (b) him*, amounts to as much as *under him*; and the Word *(c) (and)* in this Case shall be taken for *(or)* and this Word *(only)* was added only to this Purpose, that he ought to claim *only* under the Tenant in Demesne, and not paramount. As if Tenant in Tail makes a Feoffment in Fee and dies, and the Discontinuee charges the Land with a Rent in Fee, and afterwards enfeoffs the Issue in Tail within Age, so that he is remitted, in that Case *(only)* has its Operation, for now the Issue in Tail claims by Title paramount; But if the Tenant makes a Feoffment in Fee to the Use of another, in that Case *Cestuy que use* doth not claim only by the Feoffor, but also by the Statute, and he is not in the *Per*, and yet he claims under the Feoffor, and that was the Intent of the Act: So if the Tenant makes a Gift in Tail, and the Donee dies, the Issue in Tail is within this Statute, for he claims *(only)* under the Title and Estate of the Tenant in Demesne, altho' he does not claim only by Descent, but also *per formam doni*: So if Tenant in Tail be the Remainder over in Fee, the Issue in Tail is within this Statute against the Opinion in *Plow. Com. in Manxel's Case 4. b.* But it was agreed *per totam Curiam*, if *A.* has a *(d)* Rent-service, or Rent-Charge in Fee, or for Life, and the Rent is arrear, and afterwards *A.* grants over the Rent to another, and the Tenant attorns, and afterwards *A.* dies, his Executors are not within this Branch, for by the said Grant over, the Arrearages were lost, and were not due to the Testator at the Time of his Death, as the Statute speaks. Also the Conclusion of the said Branch is, *In as large and ample Manner as the said Testator might and ought to have*; and after the said Grant the Testator himself nor any other could distrain, or have any Remedy for the said Arrears: Also in the Clause next preceding touching the Action of Debt, the Words are, *Unto whom any such Rent or Fee Farm is or shall be due, and not paid at the Time of his Death*: So that the Act gives no Remedy, when the Testator himf. by his own Act has dispensed with the Arrears, but when they were

(a) 3 Leon. 262.
1 Leon. 302, 303.

(b) Co. Lit. 162. b.
(c) 2 Sid. 54.
Godb. 363.

(d) Vaugh. 40, 41.
1 Roll. 272.
Co. Lit. 162. b.

due to him at the Time of his Death, and by the Act of God become remediless; And in this Case a Judgment upon another Branch of this Statute reported by Serjeant *Bendloes*, between *Sharp* (a) Pl. and *Poole* Def. in *Communi Banco Hill.* (a) N. Bendl. 263 pl. 273. Benl. in Ash 32. Benl. in Kelw. 224. b. Co. Lit. 162. b. 135. b. Ow. 3. O. Benl. 33 Co. Ent. 119. pl. 22. 1 And. 47.

17 Eliz. in *Debt London* 457. was cited, and the Case was; A Rent Charge was granted by Deed to a Feme sole for Life, the Rent was arrear, the Woman took *Sharp* to Husband, the Rent was again arrear, the Wife died, *Sharp* brought an Action of *Debt* against the Def. Heir of the Grantor (Tenant of the Land charged) for all the said Arrearages, as well before as after Marriage: And in that Case it was resolv'd, That for the Arrearages incurred (b) before the Marriage, the Husband had no Remedy by the Common Law, but for the Arrears which incur'd (c) during the Marriage, the Husband in that Case might have an Action of Debt at the Com. Law, 26 E. 3. 64. 10 H. 6. 11. a. b. F. N. B. 121. c. 22 H. 6. 25. a. But it was adjudg'd by Force of these Words in the said Act, *That if any Man hath or hereafter shall have in the Right of his Wife any Estate in Fee simple, Fee Tail, or for Term of Life, of or in any Rents or Fee Farms, which be or shall be due behind or unpaid in the said Wife's Life, that then the Husband after the Decease of his said Wife, his Executors and Administrators shall have an Action of Debt for the said Arrearages against the Tenant of the Demesne that ought to have paid the same, his Executors or Administrators: And also may distrain for the said Arrearages in like Manner and Form as he might have done if his said Wife had then been living, &c.* That the Husband should have (d) all the Arrearages as well due before the Marriage as after: But 2 Objections were made that the Husband should not have the Arrearages before the Coverture: 1. Because by the Com. Law the Executors or Administrators of the Wife might have an Action of Debt for the said Arrearages before the Coverture; and the Statute as appears by the Preamble, provides Remedy when the Executors or Administrators of him to whom the Rent was due, *cannot have or come by the said Arrearages, &c.* And therefore it was said, That the Makers of the Act did not intend to give Remedy where there was Remedy at the Common Law, nor to take away the Remedy which one had at the Common Law, and give it to another. The second Objection was, That the said Branch touching the Husband, gives Remedy to him for the Arrearages due in the said Wife's Life; so that the Arrearages ought to incur when she was a Wife, and not before. But notwithstanding these Objections, it was unanimously resolv'd, That the Husband by Force of the said Branch, should have the said (e) Arrearages; for (e) Co. Lit. 162. b. 351. b. 1 Roll. 345.

the said Branch enacts, That the Husband shall have the Arrears incur'd in the Life of his Wife, and that can't extend

ANDREW OGNEl's Case. PART IV.

to Arrearages during the Coverture, for the Common Law in Case when the Wife has the Rent but for Life, gave him such Arrearages as appears before. And therefore when the Statute gives an Action of Debt to the Husband for Arrearages, it ought not to be construed to extend to those which he might have by the Common Law before, but to the Intent that the Words of the Act should have Effect, for (a) (*verba accipienda sunt cum effectu*) the said Words of the Act should be construed of Arrearages which were due before: And as to the said Exceptions it was resolv'd, That a Feme (b) Covert could not make an Executor without the Assent of her Husband, and the (c) Administration of her Goods of Right belongs to the Husband, and the Statute in naming the Woman (Wife) intended only to design and describe the Condition of the Woman, and not to imply that the Arrearages should incur after the Coverture.

(c) 16 Co. 28.

(b) Mo. 359, 340.
Fitz. Debit. 24.
1 Roll. 912.
On Car. 106.
20 H. 7. 22.
Fitz. 97. d.
1 E. 4. 11. b.
Fitz. Testament. 13.
1 Roll. 914.
22 H. 7. 23. 2. b.
35 H. 6. 27. b.
Br. Testament. 10.
176. Cr. Car. 106.

Br. Executors 98. Fitz. Executor 28. (c) 1 Roll. 910, 912. Dyer 251. pl. 90. 1 Jones 176. Cr. Car. 106. Mo. 371. 1 Leon. 216. 29 Car. 2. cap. 3. 1 Mod. Rep. 231. 1 Sid. 409. Hob. 3. Palm. 521, 522.

Mich.

Mich. 29 & 30 ELIZ.
Regina. In the King's-Bench.

RAWLYNS' s Case.

Between *Rawlyns* and *Somerford* the Case in Effect as it was found upon special Verdict upon Not guilty pleaded in *Ejectione firmæ*, for an House called the *Ship* without *Temple-Bar*, was such; *Peter Cartwright* being possessed of the said House for 30 Years, of all in Possession, except a Stable whereof one *Warlow* was possessed for two Years, assign'd all his Interest to *Rawlyns*; and afterwards *Cartwright* by Deed indented demised the said Stable to *Warlow*, for six Years after the said two Years ended: And afterwards *Rawlyns* by Deed indented in Consideration of 25 *l.* Fine to be paid, redemised all the House to *Cartwright* for 21 Years, rendering to him 24 *l.* per annum quarterly, and 5 *l.* quarterly at the same Feasts until the said 25 *l.* were paid; upon Condition, that if the said Sum of 25 *l.* or the said Rent was arrear at any Feast, &c. that then it should be lawful for *Rawlyns* to re-enter; and upon the Back of the said Indenture of Redemise was endorsed in this Manner, *Memorand'* It was agreed between the Parties before the Sealing and Delivery thereof, That *Warlow* shall have the said Stable according to the said Demise to him made. And afterwards and before any Day of Payment, *Cartwright* redemised the said Stable, which then was in Possession of *Warlow* by Force or Colour of the Lease for six Years made to *Warlow*, to the said *Rawlyns* for ten Years; and afterwards the Rent was arrear and lawfully demanded, and also the 5 *l.* Parcel of the Sum in gross was also not paid; and *Rawlyns* never entred into the Stable, but *Warlow* always continu'd in Possession of it, and *Warlow* never attorn'd to any of the Lessees; and if the Entry of *Rawlyns* for the Condition broke was lawful or not was the Quest. ? And after many Arguments at the Bar and Bench, now in this Term it was adjudged, That the Entry of *Raw.* for the Condi-

4 Leon. 116.
Gouldf. 89, 93, 94
Jenk. Cent. 254.
3 Keb. 500, 505.
541, 542.
10 Co. 51. a.

RAWLYNS'S Case. PART IV.

broke was lawful. And in this Case seven Points were resolved by Sir *Christopher Wray* Chief Justice, Sir *T. Garway* and the whole Court. 1. Whereas the Verdict was entred 3 Terms past, and in the Entry thereof in the Roll the said Demise made by *Cartwright* to *Warlow* was not entred to be made by Deed indented, and now in this Term it was prayed to be amended; and because the Note of the special Verdict which the Jury exhibited to the Court, and which remained with Master *George Kemp* Secondary to Master *Roper*, purported that the Jury found the said Demise, *prout, &c.* by which it appeared to the Court, that the Demise was given in Evidence, and Reference made by the Note to it; it was therefore held *by the whole Court*, that the Record in this Point shou'd be (a) amended; and so was it done in like Manner in Accompt between *Gomersal* and *Gomersal* in this very Court within 2 Years before.

2. Altho' the Condition consisted of two Parts in the (b) Disjunctive, *s.* either for Non-payment of the Rent, or of the Sum in Gros which as to that was collateral; yet if it had been found that *Cartwright* had redemised any Part of the House to *Rawlyns*, and that *Rawlyns* had entred, by which the Rent was suspended, that thereby the whole Condition, as well as to the said collateral Sum, as to the said Rent was suspended. For it was resolved, altho' the Condition comprehended two several Things in the Disjunctive of two several Natures; The one, the Rent (c) issuing out of the Land which is incident to the Reversion, and may be suspended by the Intermedling with the Land; The other, Matter (d) collateral to the Land, which cannot be suspended by the said Redemise, yet here are not several Conditions, but one intire Condition which refers to two several Branches, and therefore suspended in Part is suspended in the whole; and that the Condition was intire appears by the Conclusion of it, *s.* for the Non-payment of the one or the other, it should be lawful for the Lessor to re-enter into the whole Land, so that there is but one intire Condition, and one intire Entry, which is not by the Act of the Parties to be apportioned or divided, and because this Point was of late, *s.* *Pasch. 27 Eliz. Rot. 185.* between (e) *Brightman* and *Somerford* in this very Case (altho' between other Parties) upon grave Advice adjudged by Sir *Ed. Anderson*, and his Companions Justices of the Court of C. B. Sir *Christopher Wray*, and the Court of *King's Bench* would not suffer this Point to be argued again, but agreed with the said Court of *Common Pleas* in the Point adjudged.

3. That if *Cartwright* had redemised any Part of the House to *Rawlyns*, and *Rawlyns* never entred into it, yet the Rent by the Acceptance of the Redemise before any Entry, is (f) suspended; so that the Non-entry of *Rawlyns* makes no Difference between this Case, and the Case which was in the *Common Pleas*; for when the Lessor accepts a Redemise

(a) *Nov. 118. 119.*
Palm. 260. Jenk.
Cent. 254. 8 Co.
162. b. Co. Lit.
260. a. 2 Leon.
194. Salk. 53.
(b) 5 Co. 22. a.
1 Rolls 450.

(c) *Jenk. Cent.*
254.

(d) *Jenk. Cent.*
254.

(e) *Owen 41.*
3 Leon. 221.

(f) *Co. Lit.*
148. a. b. Cr.
Car. 101.
1 Vent. 277.

Redemise, and suffers a Stranger to occupy the Part redeemed, it suspends the Rent, as well as if he himself had entred.

4. That the said Lease made by *Cartwright* to *Warlow* by Indenture when he (a) had nothing in the House, was notwithstanding good against him by Conclusion; and when *Rawlyns* redeemed the whole to him, then was his Interest bound with this Conclusion, and then when *Cartwright* redeemed the said Stable to *Rawlyns*, now was *Rawlyns* concluded also. For all Parties and Privies in Estate or Interest are bound by Estoppels, and then the Case is no other; but *Cartwright* demises to *Warlow* for six Years the said Stable, and afterwards demises to *Rawlyns* for 20 Years, so that this is a good Lease in Reversion for 14 Years, this doth not make any Suspension of the Rent, or Condition, for it is not any Grant of the Reversion, but a future Interest in Reversion, no Term but an Interest of a Term as the Pleading is; And notwithstanding such Grant, the Reversion (without Attornment) remains in the Grantor, and he shall have the Rent reserved upon the first Lease: But if there be Attornment, then the Reversion passes, and then will follow Suspension: And therefore it was agreed, if a Man (b) makes a Lease for 21 Years, rendering Rent, with Clause of Re-entry, and afterwards the Lessee makes a Lease to the Lessor for six Years to begin two Years after, and afterwards the Rent being lawfully demanded, is Arrear, the Lessor may lawfully enter and take Advantage of the Condition, notwithstanding the Acceptance of the said future Interest, and by the Entry defeat the future Interest which was vested in him: If a Man makes a Feoffment in Fee upon a (c) collateral Condition, and afterwards the Feoffee redemises the Land to the Feoffor, and afterwards the Condition is performed; now the Redemise of the Land being no Suspension of the Condition, is no Impediment but that the Feoffor shall take Advantage of it, and thereby destroy the Term which he himself has accepted, as it is held in 20 E. 4. 19. a. 8 H. 7. 8. 20 H. 7. 4. So in the Case at Bar, the Redemise *in futuro* makes no Suspension of the Rent, and *per consequens* no Suspension of the Condition. 5. Altho' it was objected, 1. That (d) Estoppels conclude the Parties to say the Truth, but can't conclude the Jurors because they are sworn *ad veritatem de & super premissis dicendam*: And 2. That Estoppels ought to be pleaded, and in Pleading the Party ought in the Conclusion of his Plea to (e) rely upon the Estoppel, and not demand Judgment if Action, or make other Conclusion, as it is held in 22 H. 6. 53. and for these Reasons the Court shall not give Regard to this Estoppel by Deed indented found by the Jurors: Yet it was resolved in this Case, That this Estoppel being found by Verdict, the Court ought to judge upon the whole special Mat. according to Law: And true it is, that the Jurors are sworn *ad verit' dic'*; and therof. they've well done in the Case at Bar to

(a) Cr. Car. 110.
Hecl. 83. Jenk.
Cent. 254.

(b) 1 Rolls 939.

(c) 1 Rolls 939.
1 Co. 97. a. Jenk.
Cent. 254. 3 Keb.
505. 1 Co. 174. a.
2 Brownl. 228.

(d) 2 Rolls 690.
Cr. Car. 110. Co.
Lit. 227. a. 352. a.
Cr. El. 36. 37.
140. 309. Jenk.
Cent. 254. 2 Co.
4. b. Owen 96.
1 Leon. 206.
Sav. 98. 99.
Dyer 147. pl. 73.
Cart. 155. Palm.
20. Hard. 483.
2 Brownl. 150.
Hecl. 83. Moor
96. Lit. Rep.
271. 273. Larch.
241.

(e) 2 Jones 8.
Co. Lit. 227. a.
Hob. 207. 11 Co.
52. a. Doct. pl.
158.

find the whole Truth of the Case, and leave the Judgment of it to the Court, which upon the whole Matter ought to judge according to Law. And *Wray C. J.* said, That it was adjudged in (a) *Pleadal's Case*, in 8. *Eliz.* that because a Jury did not find such Lease by Deed indented which took its Operation only by Conclusion, intending that they being sworn *ad veritatem dicendam*, and that Estoppels conclude the Parties, but not the Jurors to say the Truth, were therefore attained and had Judgment accordingly; for the Justices in the same Case held, That the Interest of the Land as to Parties and Privies was in a Manner by such Conclusion bound, and no Conclusion shall be by such Deed indented after the Term ended, as *Wray C. J.* held, and in such Case the Jury ought, if they will not find the special Matter, and leave it to the Judgment of the Law, to find at their Peril according to Law. *Vide* for this Point, 17 *E. 3. 6.* 18 *Aff. 2.* 22 *Aff. 37.* 34 *E. 3. Droit 29.* 15 *E. 3. Assise 322.* 13 *E. 3. Garr. 26.* 35 *Aff. 8.* 1 *H. 4. 6. b.* 27 *H. 8. 22.* *Plow. Com. 515.* and many other Books. And upon good Consideration of this Judgment and the said Books, you shall understand and observe good Differences, and which Opinions in the Books are according to Law, and which not. 6. It was resolved that if a Man has Land for 20 Years, and he leases for two Years rendring Rent, and afterwards grants his whole Term and Interest to another, if the Lessee attorns, the Reversion shall pass; and if no Attornment is had, yet the Interest in Reversion shall pass, so that the Grantee shall have the Land after the two Years determined; For the Grant of one shall not be adjudged void, if to (b) any Intent it may take Effect. 7. It was resolv'd if Lessee of an House for 20 Years, leases Part for 2 Years, and afterwards leases the whole to another for 10 Years rendring Rent, so that this enures as a Lease in Reversion for the Part in Lease, and a Lease in Possession for the Residue, that the Rent shall issue out of the whole, and the Interest of the Term, altho' it is not any Estate which can be surrender'd, and altho' it is joyned with Land in Possession, yet the Rent shall issue out of the whole: Upon which Judgment *Somerford* brought a Writ of Error upon the new Stat. upon the Judgment and 2 Errors were assigned. 1. Because *Rawlyns* the Pl. was an (c) Infant, and was admitted by Guardian, and no Record thereof was made as is used in *C. B.* but only recited in the Court; *J. Rawlyns per A. B. gard' suum ad hoc per Cur' specialiter admiss', queritur, &c.* The 2 Error was assigned in the Judgment it self given in *B. R.* As to the 1 Error the Judges *Anderson C. J. C. B. Manwood* Chief Baron of the Exchequer, *Periam Windham*, and *Rhodes* Justices, *Clark* and *Gent* Barons of the Exchequer, and of the Coif, order'd the Presidents *B. R.* be search'd, for without Presidents, *prima facie* it seemed to them, That there ought to be a Record made of the said Admittance by Guardian; and on Search of the Records in *B. R.* many

(a) Moor 96.
2 Leon. 159. Co.
Ek. 227. a. Cr.
El. 36. 37. 140.
309. Lit. Rep.
271. 283.

(b) Lit. Rep.
321.

(c) 1 Siderf. 173.
Lit. Rep. 60.
Hecl. 52. 1 Jones
177. Hutt. 92.
Cr. El. 424. 541.
Palm. 395.

were found and shewed to the Justices, where (a) Infants had sued by Guardians in the same Court, and no Record made of their Admittance by Guardian, but such Recital in the Court as aforesaid: The Justices and Barons *una voce* in Regard of the Presidents which in this Case make a Law in the same Court disallowed the Error, altho' Presidents *in minuto numero* were shewed, where Record was made of the like Admittance of an Infant in the *King's Bench*, as is done in the *Common Pleas*. As to the Error in the Judgment, all the said Points often argued in the *King's Bench*, and upon great Deliberation adjudged, were again argued before the said Justices and Barons of the Exchequer; and after many Arguments at the Bar and Bench, all the Matters before resolv'd were from Point to Point, and for the Reasons before alledged, affirmed by all the said Justices, and Judgment given accordingly. *Ed. Coke* and others were of Council with the Plaintiff, and *Glanvill* Serjeant and others with the Defendant. And this was the last Case that *Sir Thomas Gawdy* argued, who was a most reverend Judge and Sage of the Law, of ready and profound Judgment, and of venerable Gravity, Prudence, and Integrity.

Nota Reader, according to the Opinion of *Wray* Chief Justice, it was afterwards adjudged in the *Common Pleas*, *Pasch. 33 Regina Eliz.* in the Case of one *London*, That if a Man takes a Lease for Years by Deed indented of his own Land, it is no Conclusion but during the Term, and after the End of the Term the Lessor may enter or occupy the Land, for by the Determination of the Term, the Estoppel is also determined, and then both the Parts of the Indenture belong to the Lessor, as it is held 38 *H. 6. 24*. And so the Law is now resolved in a Case which was much controverted in our Books, 14 *H. 6. 23*. 8 *H. 4. 58*. 3 *E. 4. 14*. 8 *H. 6. 17*. 44 *E. 3. Estoppel 10*. 43 *E. 3. 17*. 21 *H. 6. 2. 43 E. 3. Estoppel 7*. 3 *H. 4. 6*. 12 *H. 4. 19*. *Litt. 156*. 47 *Ass. 3. 35 Ass. 8*. 10 *E. 3. Double Plea 8*. The Opinion of *Hales* and *Montague* in *Pl. Com.*

(a) 1 Siderf. 173.
Lit. Rep. 60.
Hecl. 52. 1 Jones
177. Hurr. 92.
Palm. 295.

London's Case.
1 Anderson 12. 8.
Moor 181.
1 Rolls 871, 877.
1 Jones 459. Lit.
Rep. 372. Co.
Lit. 47. b. Cr.
Eliz. 36. Jenk.
Cent. 254.

Trin. 30 Eliz. in Cancellar':
Monstrans de Droit by the Wardens and Com-
minality of Sadlers in London in the Chancery.

1 Anderf. 180,
 181. Co. Ent.
 402. pl. 1. 9 Co.
 95. b. 96. a.

BY Virtue of a Writ of *Mandamus* after the Death of *Thomas Cox*, it was found by Enquest before *Wolstan Dixy* Mayor of *London* Escheator of the said City 17 Junii, anno 28 *Eliz.* and returned in the Chancery, That the said *Tho. Cox* die obitus sui was seised in his Demesne as of Fee of 11 Messuages and 8 Gardens in the Parish of *All-Saints* in *London*, and died without Heir, and that they were held of the Q. in Sogage: And the Wardens and Comminality of *Sadlers* in the *Chancery* shewed their (a) Right, That long Time before the said *Tho. Cox* had any Thing in the said Messuages and Gardens, one *Richard Mylard* was seised of them in his Demesne as of Fee. And so seised 6 die Aug. anno 15 *H. 8.* by his Will in Writing devised the said Messuages and Gardens to the Wardens and Comminality of *Sadlers* in Fee, and died; and that they were seised till by the said *Tho.* disseised, who so seised died without Heir: And shewed the Cust. of *Lond.* That a Citizen (b) and Freeman may devise in Mortmain; and aver'd that the said *R. Mylard* was a Cit. and Freem. of *Lond.* at the time of his Death: Upon this Plea the Attorney-General demur'd in Law; and if a *Monstrans de droit* in this Case lay, or they shou'd be put to their Petition was the great Question of the Case: And this Case on the Q's Part, and on the Parts of the Wardens and Comminality was often argued as well in *Can'* as before all the Justices of *Eng.* and Barons of the *Exchequer* at *Serj. Inn* in *Fleest.* And in this Case div. Points were resolv'd.

(a) 1 Anderf.
 180, 181. 1 Co.
 173. 2 Rolls Rep.
 421. 2 Inst. 688.

(b) 2 Bulfr. 193.
 3 Co. 129. 2.
 1 Rolls 556.

In every
 Case where
 the King is
 intituld to
 any Free-
 hold or In-
 heritance,
 his Title

Is by Mat-
 ter of Re-
 cord, which
 is either

Or by Mat-
 ter in Fact,
 and found
 by Office of
 Record on
 Oath.

Or by Mat-
 ter in Fact
 only.

1. By Record judicial, as
 Attainder, &c.

2. Ministerial on Oath, as
 Office.

3. Or by Conveyance of Re-
 cord by Assent as Fine, Deed
 inroll'd, &c.

As Alienation in Mortmain,
 Purchase by Alien born, the
 K's Villain, Escheat by Death
 without Heir, &c. and this
 found by Record Ministerial,
 as before the Escheator or o-
 ther Officer.

When Land comes to the
 King by Escheator or other Mat-
 ter of Fact, and the King's Of-
 ficers put it in Charge in the
 Exchequer without Office.

And it was resolved that in all these Cafes at the Common Law, when the King was feifed of any Estate of Inheritance or Freehold by any Matter of Record, be his Title by Matter of Record Judicial or Ministerial, or by Conveyance of Record, or by Matter in Fa&t, and found by Office of Record, he who has Right could not by the Common Law have any Traverse upon which he was to have *Amoveas manum*, but was put to his *Petition of Right* (in Nature of his real Action which he could not have against the King, because the King by his Writ can't command himself) to be restored to his Freehold, and Inheritance, 4 *H. 6.* 12. 24 *E. 3.* 23. 1 *H. 7.* 3. 4 *E. 4.* 21. *b.* 9 *E. 4.* 52. But at the Common Law the Party grieved might in some Cafe have his *Monstrans de droit* where the King was so entitled, and in some Cafe not, when the King's Title was by Matter in Fa&t, as by Reason of Purchase by an Alien born, or the King's Villain, or for Alienation in Mortmain, or by Death of the King's Tenant without Heir, &c. in all these and the like Cafes, if Office be found for the King, and in the same Office the Title or Interest of the Party be found, there the Party grieved might at the Common Law have his *Monstrans de droit*, because his Title appears by the same Record, whereby the King is intituld; as if a Disseisor aliens in Mortmain, or to an Alien born, or to the King's Villain, or dies without Heir, the Land being held of the K. and all the special Matter is found by Office, *f.* the Disseisin and the Alienation, or the Death without Heir, in all these Cafes the Party griev'd should have *Monstrans de Droit* at Common Law; And so are the Books to be intended in 9 *E. 4.* 51. & 13 *E. 4.* 8. *a.* 4 *E. 4.* 21. 33 *E. 3.* *Traverse* 36. It was found by Office that *T.* by Licence of the King did marry the King's Neif, and that certain Lands descended to the same Neif, which her Husb. aliened without the K's Licence (his Wife being the K's Neif) to another, and for this Cause the Land was feifed; whereupon the Alienee came into the *Chancery* and shewed all his Cafe which was found by the Office, and because the whole Truth of the Cafe, *f.* The K's Neif, married by his Licence; 2. The Descent to the Neif after the Coverture appeared in the Office; it was awarded, That for this Cause the Husb. might hold by the (*a*) *Courtesie*, and by his Alienation put the Wife to her Action, and thereupon by Award the Alienee had Restitution; By which Cafe it appears; first that the Woman being married by the K's Licence, is enfranchised (*b*) at least during the Coverture, for if she should remain Neif, then the Husb. should not be Tenant by the *Curtesie*; for when the K's Title, and the Title of a Subject concur in the Beginning, the K's Title shall be (*c*) preferred, as *Weston* holds *Plow. Com.* 263. *b.* 2. That when the whole Truth of the Cafe appears in the Office, that there was *Monstrance de droit* at the Common Law: So if Land was conveyed to the King upon Condition, if the Performance of the Condition be of Record,

2 Cro. 186.
1 Rol. Rep. 95.

(a) 1 Leon. 47.
Co. Lit. 30. b.
Goldsb. 29.

(b) Co. Lit.
30. b. 136. b.
137. b. Doct. &
Stud. 140. a.

(c) Co. Lit. 30. b.
9 Co. 129. b.
Hard. 24.

The Case of the Wardens, and PART IV.

as if the Condition be to levy a Fine of other Land to the King, or to make a Recognisance to the King in any Court of Record, or other like Conditions which are to be performed of Record; he who has performed the Condition may have his *Monstrans de droit* at the Common Law, for his Title appears of Record, and there is no Record which absolutely entitles the King: But if the Performance of the Condition be not on Record, then if the Performance of the Condition be found by Office, he shall have *Monstrans de droit* by the Common Law, *vide Plow. Com.* 229. But in the same Case if the Office finds only Title for the King, and omits the Right or Title of the Party, altho' all the Words of the Office are true, yet by the Common Law he can't have *Monstrans de droit*, but for the Reason aforesaid he was put to his Petition, and therewith agrees *Piers Partifield's Case* in 20 *Aff. p.* 31. it was found by Force of a Writ of *Diem clausit extremum*, that one held certain Lands of the K. in *Lond.* and died seised without Heir, wherefore the K. gave the Lands by his Letters Patents to *Piers Partifield* for his Life, who sued a Writ to the Mayor of *London* to put him in Seisin, and thereupon nothing was done, for which Cause he sued *Sicut alias, vel Causam nobis significes*, upon which Writ the Mayor returned, That the K's same Tenant by his Will in Writing and enrolled before the Mayor devised the Land to his Wife for Life, and that she or her Executors should sell the Reversion for his Soul, and that the Wife and *John Digle* her now Husband were in by the said Devise, wherefore he could not make Livery; and afterwards *P. Partifield* by Force of the K's Patent entred, whereupon *John Digle* and his Wife sued a *Scire facias* against *Piers P.* if he could say any Thing wherefore they should not be restored: *Piers P.* demanded Judgment of the Writ for 2 Reasons. First, Because he held but for Life, the Reversion to the King, in which Case Suit should be made against the K. 2. Since an Office was found for the K. he shou'd not have this Suit before that upon his Petition an Office is found as it ought to be intended for him, and so before he is admitted to shew his Right, he ought to have his Right as well found by Office, as the K's Title was found by Office, for that is *aquale jus*: To which it was answered: 1. That since they were seised of the Freehold, that they were not to be ousted without Suit. 2. That against the King Petition could not be sued, because *Piers* was Tenant of the Freehold: 3. That this Matter returned by the Mayor, &c. shou'd serve for an Office, for by the Office the Reverse of her Matter was not found; which is as much as to say, That the whole Matter found by the Office was true, *scil.* that the Tenant held the Land of the K. and died without Heir, and by the said Devise it was confess'd and avoided. And to decide these Quest.

all

2 Rolls 215.
Hard. 13.

Br. Livery, &c.
42. Br. Office
Antea, &c. 19.

all the Justices of *England* were assembled in the *Chancery*; And by the Award of *all the Justices* the Writ was abated, because no Office was found for *John Digle* and his Wife, and they were directed to sue to the K. (*J.* by Petition) for an Office which might serve them. Out of which Award of all the Justices I observe these Things: First that at Common Law when by Office the K. was seised of an Estate of Freehold, altho' all the Points of the Office were true, yet the Party grieved was put to his Petition in Nature of his real Action, unless his Title was found by the Office. 2. That a Petition lies to the K. altho' he has departed with the Freehold. 3. That forasmuch as the K's Title is found by Enquest of Office upon Oath, the Title of the Subject ought to appear by Record of as high Nature, *s.* by like Enquest of Office upon Oath, and not by the Return of the Mayor, which altho' it is of Record, yet it is not of so high and great Regard in Law as the Office found by Oath: So *Nota*, Judicial Records as Attainders and Judgments are preferred before Ministerial Records, as Inquisitions, and Offices before Escheators, and they also being found in Course of lawful Proceeding by Oath before Returns, or Conveyances of Record, as hereafter more fully appears to you in this Case. And in 30 *Ass. pl.* 28. by *Diem clausi extremum* it was found, that *J.* held of the K. and that *M.* was his Daughter and Heir who was of full Age and had Livery; And by another Office it was found, that the same *J.* had another Daughter *K.* who was yet within Age, by which a *Scire facias* issued against the said *M.* and her Husband, &c. who said, That the Land was given to *J.* and to his first Wife Mother of *M.* in Tail, and that *K.* was the Issue of another Wife, and so *M.* sole Heir. But by Award of the whole Council (*s.* the Justices, who are as to Administration of Just. called in Law the Council) all the Land was seised into the K's Hands, because the Tail was not found by any Office, but only that *M.* was general Heir; So at Common Law, if the King by false Office was possessed of the Custody or Interest in any Land by Reason of Ward, or Ideocy, or Alienation without Licence, or the like, in such Cases altho' the King was not entitled to a Freehold, but to a Chattel real, and by false Office only, yet the Party grieved could not have a Travers, and thereupon to have *Amov' manum*, but was put to his Petition by the Com. Law; and therewith agrees the Book in 17 *E. 3. 11. a. b.* But yet as well a Travers as a *Monstr' de droit* was at the Com. Law, as well concerning Freeh. and Inheritance as Chattels real, for in all Cases when by the Office Land is not in the K's Hands, nor the K.

thereby

Stamf. prer.
83. b. Br. Office
Antea 21. Br.
releisei pro Re-
ge 25. Br. Scire
fac' 220. Co.
Lit. 77. b.
Postea 56. b.

Co. Lit. 77. b.

The Case of the Wardens, and PART VI.

thereby in Possession, but the K. by the Office is only entitled to an Action, and can't make a Seizure without Suit, there in a *Scire facias* brought by the K. in the Nature of such Action to which he is entitled, the Party may upon the said *Scire facias* appear, and traverse the Office at the Common Law, for the Party is in Possession, and upon the Matter found for him shall not have any *Amoveas manum*, because by the Office nothing was in the K's Hands, but the K. shall be barred of his Action. And therefore if it is found by Office that the King's Tenant has (a) ceased for two Years; or that the K's Tenant for Life, or Years has committed Waste, or that his Tenant by Knight's Service has made a Feoffment by Collusion, in these Cases the King is put to his *Scire facias* against the Tenant, and in all these Cases the Tenant in the *Scire facias* might traverse the Cesser, Waste, and Collusion at the Common Law, and therewith agree the Books in 14 (b) *H. 7. 23. a. & 25. a. (c)* 15 *H. 7. 6. b. & 12 H. 7. 21. b.* it appears also by a Book before any Statute made which gives Travers, or *Monstrans de droit*, (d) 30 *Aff. 28. 32 E. 3. Scire facias 106. 32 E. 3. Travers 38 (e) 50 Aff. 2.* It was found by Office that *W.* the K's Tenant in *Capite* died, and that the Tenancy descended to *R.* his Son and Heir who is a Fool and Idiot from his Birth, and that *N.* was Terre-Tenant, against whom a *Scire facias* issued, if he could say any Thing that the Land should not be seized into the King's Hands, who came and pleaded that this *R.* after the Death of *W.* released to one *F.* then Tenant, all the Right, &c. who enfeoffed him, at which Time *R.* was of good Memory; and traversed the Point of the Office, *scil.* without that, that *Richard* was a Fool from his Birth, for it would be in vain to award a *Scire facias* to know if he can say any Thing, &c. and when he comes that he should plead nothing: But if the Office finds no other in Possession but the Idiot, thereby the K. is in Possession, then he who in Truth was Terre-Tenant and is ousted by the Office, can't traverse the Office to have *Amoveas manum*, because it doth not appear by the Office, that he was Tenant at the Time of the Office, but is put to his Petition: But forasmuch as in Case when the K. was in Possession by the Office, or might seize without Suit, there the Party was put to his Petition, which Suit was tedious, and of great Delay and Charges to the Party grieved, for his Relief was the Stat. of (f) 34 *E. 3. cap. 14.* made, by which it is enacted, That where Lands or Tenements are seized into the K's Hands by Office of the Escheator, containing that the K's Tenant made thereof Alienation without the K's Licence, &c. Out of which Words divers things are to be observ. 1. where it is said, where Lands or Tenem. are seized into the K's Hands, &c. it thereby appears that the Mischief was, where the Lands or Tenem. were seized into the K's Hands by the Office, for it was not any Mischief as has been said, where the K. was entit. but to the Action, for there was traverse at the Com. Law. 2. That this Act ex-

Vaugh. 62.

(a) Kelw. 33. a. b. 200. b. 9 Co. 96. b. Stamf. prær. 55. a. b. 3 Co. 11. a.

(b) Br. Scire fac' 122. Stamf. prær. 55. a. (c) Stamf. prær. 55. b. 9 Co. 96. b. (d) Stamf. prær. 83. b. Antea 56. a. Br. Office Antea 21. Br. rescifer pro Rege 25. Br. Scire fac' 220. Co. Lit. 77. b. (e) Br. Alienat. 14. Br. Idiot 2. Br. travers de Office 22. Br. Office devant 24. Postea 126. b. Br. Feoffment. de &c. 62.

(f) Kelw. 178. pl. 11. 4 E. 4. 21. b. Br. Petition 28. Br. Traverse 33. Fitz. Traverse 5. 3 Cro. 523. Stamf. Prær. 61. Moor 659.

only where the King was entitl'd by Office only, for the Words are feis'd into the King's Hands by Office of the Escheator. 3. That this Act extends only to the Case of Alienation without Licence, and to the Case of Ward. But three Things were grievous to the People which were not remedied by this Act. 1. That no Office was within the Purview of this Act, but only Office found *virtute brevis*, or *commissionis*; for the Words are (taken by the King's Commandment) so that an Office found *virtute officii*, was out of this Act. 2. That the said Act as appears before, extends only to the said two Cases of Alienation without Licence and Ward. 3. That the said Act extends to a Traverse only, and not to *Monstrans de droit*, by which altho' on the Traverse the Issue was found for the Plaintiff, yet the Judges could not proceed to Judgment without a Writ *de Procedendo ad judic'*, which were great and grievous Mischiefs; for Remedy of which another Statute was made *anno 36 E. 3. cap. 13*; for the grievous Complaints which the King had heard from his People of his Escheators, &c. He willed and ordained, with the Assent aforesaid, That Lands feis'd into the King's Hands for Cause of Ward, be safely kept without Waste, &c. So of other Lands feis'd into the King's Hands by Enquest of Office taken before Escheators, which Words are general. 1. As to the Matter, for they are not restrain'd to the two Things, *s. Alienation without Licence, and Ward mention'd in the former Act.* 2. As to the Office, for they extend as well to Offices found *virtute brevis, sive commissionis*, to which only the former Act extended, as to Offices found *virtute officii*. And as to the great Objection which was made, that forasmuch as the Words of the Act are, that the Escheator shall send the Enquest into the Chancery, within the Month, &c. that it ought to be intended of an Office found *virtute brevis, sive commissionis*, because no Office found before the Escheator *virtute officii*, could by the Law be return'd into the Chancery, but only into the Exchequer, as it is said in *4 E. 4. 24. a. & Stamford. Prærog. 70. b.* To that it was answer'd and resolv'd upon shewing of infinite Precedents in all Ages, that such Offices had been return'd by the Escheator as well into the Chancery, (*a*) as into the Exchequer, and the Escheator had Election to return it into which of the Courts he would, for he is attendant to both Courts, and both are the King's Courts; Then the Statute goes further, and be heard without Delay to traverse the Office (which Words as to the Matter and Manner of the Office, are general, so that by these Branches, the two first of the said Defects were remedied) or otherwise to shew his Right, &c. By which the *Monstr' de droit* was given to make a final Discussion without attending other Commandment, by which Words they shall proceed to Judgment without any *Procedendo*; and so all the said Mischiefs were remedied. But it was resolv'd, that this Act doth not extend to any Judicial Record, as Attainder, or Recovery, but only when

Kelw. 178.

3 Cr. 523.

2 Rolls Rep. 351.

(a) 1 Co. 42. b.
32. b. Moor 416.
4 Inst. 225.
Kelw. 173. a.
Ley de Gards 8.
Liveries 25.

(b) Hard. 141.

The Case of the Wardens, and PART IV.

(d) Hard. 81.

(b) 5 Co. 26. a.
1 Brownl. 191.
2 Co. 53. a.
6 Co. 43. b.
2 Inst. 359, 573.
Dav. 35. b.
5 Co. 111. a.

* Lanc 58.

(c) FitzPetit. 17.
Br. Petit. 10.
Br. Nonliuit 12.

(d) 36 E. 3. c. 12.
Antea 57. a.
(e) 34 E. 3. c. 14.
Antea 56. b.
Kelw. 178. pl. 11.

(f) Br. Office
Antea 23.

(g) 3 Inst. 12.
Hales 17. 1 Inst.
390. 22 Rich. 2.
nu. 9. Cort. Rec.
378. Stamford Cor.
189. a. Plowd.
262. a. 263. a.
3 Inst. 12.
22 Rich. 2. nu. 27.
Cort. Records 381
(h) 4 Inst. 73.
17 E. 3. 13. a.
2 Sid. 101.
(i) Fitz Petition
13. Br. Petit. 4.
Br. Sci' fac' 55.
Br. Travers de
Office 5.

nothing appears of Record for the King but only the Office; and therein the Makers of the Act had great Reason, for in Case of Attainder and Office, the King is entitled by (a) double Matter of Record, wherefore the Party griev'd ought to avoid it by double Matter of Record, and not by single Traverse, or *Monstrans de droit*; for it was said, *Nihil tam (b) conveniens est naturali equitati, unumquodq; dissolvi eo ligamine quo ligatum est*, and therefore he shall be put to his Petition, upon which he shall have an Office found containing his Title of Record, which is requir'd by the Justice of the Law, because the King's Title commences by Record, and thereupon the Party griev'd shall traverse the King's Title found by the Office, or shew his Right and confess and avoid it; and if upon the Traverse, or *Monst' de droit* it is found for him, or the K's Attorney confesses it,* then he shall have *Amov' man'*, for he has answer'd and satisfied double Matter of Record with double Matter of Record; *Vide 11 H. 4. 52. b.* Another Reason was, when the King is in by Force of a Title by Judicial Matter of Record, as by Attainder or Recovery, there for the Estimation and Credit which the Law gives to Judicial Records, the Party is put to his Petition: These Resolutions of the Justices in this Case agree with our Books. 1. That the Statute of (d) 36 E. 3. extends to other Cases, than to the State of Alienation without Licence and Ward, which are mention'd in the Act of (e) 34 E. 3. there are divers Cases agreed in our Books; and therefore 43 Ass. 28. it was found by Office return'd into Chancery, that one W. of (f) *Herlington*, who was seised of certain Lands in the County of *York*, was aiding to *Guilbert de M.* who was the King's Enemy, whereby the Lands were seised into the King's Hands, and thereupon came W. into Chancery, and travers'd the Office, and it was found for him, and he had Restitution by Judgment of the Court, which special Case is not mention'd in the Act of 34 E. 3. but is included within the general Words of 36 E. 3. *Cave Lector*, for at this Day altho' a Man is aiding to the King's Enemies, or is kill'd in open Rebellion against the King, he shall not (g) forfeit his Lands nor his Goods; but if the Chief Justice of the King's Bench (who is supream (h) Coroner of all *England*) in Person upon the View of the Body of him kill'd in open Rebellion, makes a Record of it and returns it into the King's Bench, he shall forfeit his Lands and Goods, as it was done and resolv'd in the Time of *H. 7.* by *Fineux C. J. Vide 8 E. 3. 38. 7 H. 4. 47.* and in 2 *H. 4. (i) 10. b.* *Sir Tho. Talbot's Case*; The Possessions of a Prior alien were seised into the King's Hands for certain Cause, and afterwards the King, made Livery thereof &c. and after Livery the King by Writ out of the Chancery had taken them again into his Hands by this Word *resumptimus*, and committed them to one *Tutbury*; and now came the Executors of the said *Sir Tho-*

mas, who had a Term for Years in the said Possessions, and in the Chancery exhibited their Traverse, and had a *Scire facias* against the said *Tubury*, and there *Skrene* for the Def. demanded Judgment of the Writ, for where the King seises for Cause, a Man may have a Traverse to the Cause, and answer to it by the Statute, meaning the said Act of 36 E. 3. for this Case of Prior Alien was not within the said Act of 34 E. 3. But where the King seises into his Hands, and determines no Cause wherefore in certain, he ought to sue to the King by Petition, *quod fuit concessum* by the Justices assembled together for this Purpose in the Chancery. *Nota* Reader, it thereby appears, That a Termor may have a Traverse in that Case by the Statute of 36 E. 3. But it was objected, that neither the Statute of 34 (a) E. 3. nor the Stat. of 36 (b) E. 3. extended to the Case at Bar, because in this Case the King was intitled to the Freehold and Inheritance, and the said Acts give Remedy only when the King is entitled to a Chattel, as Ward or Alienation without Licence, &c. To which it was answer'd and resol'd. That the Act of 36 E. 3. extends generally to Lands seised, &c. by Office, which is a beneficial Law made in Advancement and for Execution of Justice and Right without grievous and tedious Delay, and therefore shall be taken as generally according to the Letter and Intent of the Act, and with this Resolution in this Point agree the Books 13 E. (c) 4. 8. a. 4 E. 4. (c) Br. Travers d' Office 38. 22. b. *Lord Hungerford's Case*, 3 H. 7. 20. *Ld. Greystock's Case*, Fitz Trav. 9. 49 E. 3. 16. a. b. *Isabel (d) Goodcheap's Case*, & 10 R. 2. *Travers* 37. and so the *Quare in Stamf. Prærog* 61. well resolvd; and the Book in 8 H. 5. *Travers* 47. is to be intended at the Common Law before the said Act: It was also resolvd, that when the King's Tenant seised of Lands in Fee dies without Heir, that the Fee (e) and Freehold is immediately after his Death and before Office found thereof cast upon the King; for in such Case it ought to be in some Person, and if any Person enters into the Land and takes any of the Profits, an Information of Intrusion for the King may be preferred against him before Office or Seisure; for the K. immediately by the Death is in actual Possession, and has not only a Freehold in Law, as a common Person in such Case has; and as to that, this Difference was taken and agreed; when the King's Tenant dies in Possession without Heir, so that in such Case *possessio est vacua*, and in nobody, there the Law will adjudge the K. (in whom no Laches shall be reckon'd) in actual Posses. immediately; but when anoth. is in Seisin and Posses. at the Time of the Escheat, so that *posses plena est* (f) & non vac, there the K. shall not be adjudg'd in Posses. till this Seisin (f) and Posses. is remov. as if the K's Ten. is (g) disseised and dies without Heir; or if an Alien born, or the K's Villain, or the Alienee in Mortm. is disseis. and all this is found by Office in these Cases the K. shall not be in Posses. till the Posses. and Seisin of the Terre-tenant is removed; but if Land descends to the K.

(a) 34 E. 3. c. 14.
(b) 36 E. 3. c. 13.

(c) Br. Travers
d' Office 38.
Fitz Trav. 9.
(d) 2 Co. 53. a. b.
8 Co. 76. b.
Lit. Rep. 123.
Godb. 443.
Cr. El. 640.
Br. Escheat 32.
Br. Devise 10.
Fitz Devise 8.
Plowd. 259. a.
Raym. 83.
Hard. 13. 14.
Swinb. 335.
2 Roll. Rep. 357.
2 And. 113, 114.
(e) 3 Co. 10. b.
9 Co. 95. b. 96. a.
Plowd. 229. b.
2 Rol. Rep. 321.
Cr. Car. 173.
Godb. 312.
1 Jones 71.
3 Leon. 187.
9 H. 7. 2. b.
Br. Office Antea
173. 34. Br. Pre-
rogative 91.
Br. Esch. 25. 33.
Moor 291.
Hard. 14.
(f) Hard. 14.
(g) Hard. 14.

The Case of the Wardens, and PART IV.

after the Death of his Father, or any other collateral Ancestor, the K. shall be immediately in Possession before Entry or Seifure : So if the K. makes a Lease for Life, or a Gift in Tail, and the Lessee dies, or the Donee dies without Issue, in this Case the Possession shall be actually in the K. without any Entry or Seifure, and therewith agrees (a) 9 H. 7. 2. b. and there it is expressly said, That when no Man is in Possession, it shall be adjudg'd in the K. according to his Title; and so the Doubt which *Stamf.* makes *Prærog.* 53. b. well resolv'd : But it was hereupon strongly urg'd by one of the Justices, that in the principal Case the Company of Sadlers should be put to their Petition, for inasmuch as immediately after *Cox* was dead without Heir, the Possession was actually in the Queen; then before Office found they were put to their Petition, for the Act of 36 E. 3. extends only in Case where an Office is found, for that is the Record traversable by the Statute; and therefore he said, If a Disseisor conveys the Land to the K. in that Case the Disseisee was put to his Petition by the Com. Law, and therewith agree 22 E. 3. 5. 24 E. 3. 23. 4 E. 4. 22. and that is not remedied by the said Act; for altho' the K. is entitled by a Record, yet it is not a Record traversable by the said Act : So he said, when *Rich. D. of York*, Father of *K. E. 4.* disseised one and died seised, and it descended to *K. Edw. 4.* now the Disseisee was put to his Petition; and therefore altho' the Descent was afterwards found by Office, and altho' the K. was entitled by Office, and single Matter of Record only, yet he was put to his Petition, and was not remedied by the said Act, as appears in 9 E. * 4. 51. b. 2. It was objected, That the Statute of 36 E. 3. cap. 13. extends only in Case where one is put out of Possession by the Office, as *Stamf.* conceives *Prærog.* 61. a. But in this Case the Company of Sadlers was not put out of Possession by the Office, but by the Disseisin made by *Cox* to them, and therefore this Case was not remedied by the said Act. But as to that it was answer'd and resolv'd, That it is a Maxim in Law, that when one common Person against another common Person is put to his real Action, in such Case he shall be put to his Petition, (b) which is in lieu of his real Action against the K. *Vide* 7 H. 4. 33. 9 H. 4. 5. and therefore there is a great Difference between the Cases which have been put, and the Case at Bar; For 1. as to the said Case where Land descends to the K. from his Ancestor, by this Descent the Entry of the Disseisee is toll'd, if it was in the Case of a common Person, and therefore in the Case of the K. he shall be put to his Petition : But in Case of Escheat, when a Disseisor dies without Heir, if it was in the Case of a common Person the Entry of the Disseisee was not toll'd, but he might enter upon the Lord by Escheat; and altho' it should be admitted, that in the Case at Bar, the Company of Sadlers could not have their

Mon-

(a) 3 Co. 10. b.
9 Co. 95. b. 96. a.
Br. Offices Antea
34. Br. Prærog. 91.
Br. Esch. 25. 33.
Plowd. 229. b.
Moore 393.
3 Leon. 187.

* 7 Co. 11. 2.
Calvin's Case.

(b) 2 Co. 53. 2.
Plowd. 489.
2 And. 112.

Monstrans de droit before Office found, and that it should remain at the Common Law not remedied by the said Act of 36 E. 3. yet when Office is found it has Relation to the Time of the Death of the Tenant without Heir, and now the Stat. of 36 E. 3. extends to it; and if it should be also admitted, That the Case when a Disseisor conveys Lands to the K. that remains not remedied by the said Act of 36 E. 3. because there is no Record traversable by the Act in such Case, yet forasmuch as in the Case at Bar Office is found, that the Record is traversable, the Party griev'd by the Purview of the said Act shall have *Monstrans de droit*. And as to the second Objection, it was resolv'd, that the Stat. of 36 E. 3. extends to this Case, altho' the Party griev'd was not ousted by the Office, for the Words are, *And if there be any Man that will make Claim or Challenge to the Lands, &c.* and that without Question the Party griev'd does, for he makes Challenge and Claim to the Lands found by the Office; and the Statute does not say if the Party griev'd be ousted by the Office: And so the Doubt which *Stamford* conceiv'd in this Point also well explain'd. And it was well urg'd, That the Stat. of 36 E. 3. has provided Remedy when the K. by Office is intitled to Land, either by Purchase of his Villain, or of an Alien born, or by Alienation in Mortmain, or by any such Title which is Matter of Fact, or in *pais*, and the Office is the sole Record which entitles the K. because the Makers of the Act of 2 E. 6. have provided Remedy only when the K. is entitled by double Matter of Record, as Attainder of Treason, Felony, and *Premunire*, and Office: And it was said, That if Travers and *Monstrans de droit* had not been provided in the said Cases of the King's Villain, Alien born, Mortmain, &c. by the former Act, without Doubt they for these Cases also would have provided Remedy, because these would be in as great Mischief if the Party griev'd should be put to his Petition, as where the K. was entitled by double Matter of Record: But it was said, if the K. Lord, Tenant in Tail, the Remainder over in Fee, Mesn and Tenant be, and the Mesn aliens the Mesnalty in Mortmain, or to the King's Villain, or to an Alien born, and upon Office thereof found the K. seises, Tenant in Tail dies, the Tenancy escheats, the Issue shall not have Travers nor *Monstrans de droit*, for the Escheat is a Thing newly accru'd and dependant upon the Seigniorie; and forasmuch as the K. had the Seigniorie at the Time of the Escheat, of Necessity the Land shall escheat to him *quousque*, &c. and he shall be put to his Petition in such Case, *Vide 8 H. 4. 9. vide Plow. Com. Wims. bishe's Case.* If a Tenancy escheat to a Woman who hath a Joynture, it is out of the Stat. of 11 H. 7. And lastly, a Judgment in the Point now lately given in the Exchequer was vouched, where the Case was, That by Office return'd into the Exchequer it was found, That *Jane Wife of Theophilact Aden* was

36 E. 3. cap. 13.
9 Co. 129. b.

Co. Lit. 77. b.

Plowd. 44. b. 522
Br. 61.
Inst. 365.

The Case of the Wardens, and PART IV.

was seised of certain Lands in Fee, and held them of the Q. and dy'd without Heir, and one *Collins* and *Howstead* came into the Exchequer, and by way of *Monstrans de droit* alledg'd, that one *Nicholas Reynolds* was seised of the said Lands in Fee, and by his Will in writing, devised them to *Emme* his Wife in Fee and dy'd; The Wife did thereof enfeoff *Collins* and *Howstead*, by which they were seised 'till disseised by the said *Jane*, who dy'd without Heir, and so confessed and avoided the Office. And by the Rule of the Court, the Attorney-General answer'd thereunto, and maintain'd the Office, and traversed the Devise, which was found against the Queen. Out of which Judgment I observe, That the Barons adjudg'd the said Act of 36 E. 3. to be taken by Equity; for the said Act speaks only of Offices return'd into the Chancery, and the said Office was return'd into the (a) Exchequer, which without Question was within the Intent and Meaning of the Act, *Vide Stamf. Prærog.* 70. And in this Case, this Difference as to Petition, Travers, and *Monstrans de droit* was resolved; In all Cases at the Common Law, when the King's Title accrues to him by a Judicial Record, or as *Gascoigne* 9 H. 4. says by Judgment of Record, there altho' the King grants all his Estate over, yet the Party griev'd was put to his Petition, and should have *Scire facias* against the Patentee, as in Case of Attainder, Recovery, &c. 44 E. 3. 22. 10 H. 6. 15. 21 H. 7. 2. 3 Mar. 139. 7 H. 4. 21. But where the K. was entitled by Conveyance of Record, as if a Disseisor convey'd the Land to the K. by Fine, Deed enroll'd, or other Matter of Record, there altho' the Party was put to his Petition against the King; yet if he granted the Land over, the Disseisee, or he who had Right, might (b) enter, or have his Action against the Patentee; for a Judicial Record is prefer'd always before a Conveyance of Record by Assent, as has been said; *vide* 9 H. 4. 4. by *Gascoigne* the same Difference, 25 E. 3. 48. a. *Plow. Comm.* 553. 22 E. 3. 7. 11 H. 4. 67. 7 R. 2. (c) *Aide del Roy* 61. by which Books, if they are well consider'd, this Difference appears. Also in all Cases when the Party griev'd might have *Monstrans de droit*, or traverse against the K. there if the K. granted over the Land, the Party griev'd might enter or have his Action against the Patentee, *Stamf. Prærog.* 75. a. *vide* 4 E. 4. 22. 3 Mar. *Dyer* 139.

Nota Reader, in Communi Banco inter Pemberton & Barham, Pasche 32 Eliz. Rot. 235. and in the King's Bench, *Hill* 42 *Eliz.* in a Writ of Error, between *Bereblocke* and *Read*: it was resolv'd, That if *A.* is bound in a Recognifance, or Statute Merchant, or Staple; and afterwards a Recovery is had against *A.* in an Action of Debt, and *A.* makes his Executors and dies, his Executors are bound by the Law to pay the Debt due upon the Recovery, altho' it be Puisne, before the Debt due by

Recognifance

(a) Antea 57. a. Stamf. Prærog. 70. b. 1 Co. 42. b. 52. b. Moor 416. 4 Inst. 225. Kelw. 173. a. Ley de Gards & Liveries 25.

(b) Kelw. 97. pl. 17. 2 And. 113. 114.

(c) 2 Co. 53. a. Co. Lit. 354. b.

5 Co. 29. 2. 1 Roll. 926. Swinb. 369. 370. 2 And. 160. Yelv. 29. Cr. El. 734. 735. 822. 2 Brownl. 39. 87. 82. Co. Ent. 152. 3 Leon. 270.

Recognizance, or Statute, because altho' both are Records, yet the Judgment in the King's Court upon judicial and ordinary Proceeding is more notorious and conspicuous, and of more high and eminent Degree than a Statute or Recognizance taken in private and by Consent of the Parties, and therefore preferr'd in Judgment of Law before Recognizance, or Statute, which agrees with the Reason of the Resolution in this Case: And I thought this Case necessary to be reported, for by this the Reader shall understand what was the Common Law before any Statute made concerning this Matter, and what Cases are remedied by the said Statutes of 34 ^{34 E. 3. cap. 24.} & 36 ^{36 E. 3. cap. 13.} E. 3. and therefore you will better apprehend the true Intention and Purview of the Statute of 2 E. 6. concerning these Matters.

*Mich. 30 & 31 ELIZABETHÆ,
In Communi Banco.*

FORSE and HEMBLING's Case.

1 And. 181, 182.
Gould. 109, 110.
Swinn. 439.
Hard. 375.
Palm. 304.
Lane 74.
3 Rolls Rep. 372.
5 Co. 10. a. b.

*F*orse brought *Ejectione firma* against *Hembling* on a Demise made by *Thomas Calie* to the Plaintiff for three Years, of certain Houses in *Norwich*, from the Feast of *S. Michael, anno 29 Eliz. &c.* To which the Defendant pleaded not guilty; and the Jury gave a special Verdict, *s.* That one *Alice Allen* was seised of the said Houses in Fee, and made her Will in writing, and thereby devised, that if *James Amynde* surviv'd her, that then she devised and bequeath'd to him and his Heirs the Tenements in Question, and afterwards she intermarry'd with the said *James Amynde*; and further found, that she oftentimes after the Marriage revoked the said Will, saying, that the said *James Amynde* should not have the said Tenements by the said Will, and afterwards the Wife dy'd seised without Issue, and the Husb. surviv'd, and thereof encoffed the Defendant, upon whom the said *Thomas Calie* as Heir to the said *Alice*, enter'd and made the Lease, as in the Declaration, and pray'd the Advice of the Court. Upon which Verdict two Questions were mov'd. 1. If the Will of a Woman by the Intermarriage with the Devisee was countermanded, or not. 2. If it was not countermanded by the Intermarriage, if by her Words of Revocation after the Marriage it was countermanded. And it was objected, by the Husband's Counsel. 1. That if a Feme sole makes her Will and devises her Land to *A.* and afterwards marries *B.* and afterwards *B.* dies, and the Wife survives him, in that Case it was said that the Will remains good, and was not countermanded by the Marriage, as *Manwood* said in *Flow. Com.* 343. and was not deny'd; but if it was admitted that the Will in such Case was countermanded by the Marriage with a Stranger; yet in the Case at Bar for the Benefit of the Husb. being the Devisee, the Will shall not be countermand. and therefore it is adjudg'd in 2 (a) R. 2. Attorn-

(a) Goldsb. 109.
110. Brid. m. 83.

ment

ment 8. That where a Feme sole makes a Lease for Life rendering Rent, and afterwards by her Deed grants the Reversion to another, and afterwards and before Attornment marries with the Grantee, that this Marriage was not a Countermand (a) of the Attornment, as if she had marry'd with a Stranger, for it is for the Benefit of the Husband that it shall not be a Countermand, and therefore there by the Payment of the Rent by the Tenant to the Husband in the Name of Attornment, the Reversion pass out of the Wife to the Husband, for the same Reason which proves that the Intermarriage with a Stranger shall be a Countermand of the Attornment for the Benefit of the Husband, proves that when the Grantor marries with the Grantee, that it shall not be a Countermand, for that shall be for the Benefit of the Husband. And so in the principal Case it is for the Benefit of the Husband, that the Will by the Marriage shall not be countermanded, but shall take Effect according to the Purport thereof: And it was said, That the Case of a Will when the Woman marries with a Stranger is not like the Case of Attornment, when the Grantor marries with a Stranger; for the Will of a Woman can't take any Effect during her Husband's Life, but only after his Death, and can by no Possibility be any Prejudice to him: For if he has Issue he shall be Tenant by the Courtesie, and he may take the Profits thereof during the Coverture, or dispose of them at his Pleasure to all Intents and Purposes, as if no Will had been made. 2. To say as it is said in 3 E. 3. Devise 12. that the Will (b) of a Feme Covert is void, because the Law presumes that it was made by Cohesion of the Husband, that can't be so intended in this Case, forasmuch as in the Case of 3 E. 3. the Will was made by a Woman when she was Covert, which can't be made good by any Custom: But here in our Case the Woman was sole, and free from all Constraint at the Time of the making of her Will. 3. It was objected, that if the Will was not countermanded by the Intermarriage, without Question it was not nor could be countermanded by the Woman's Words after the Marriage, for after Marriage the whole Will of the Wife is in Judgment of Law subject to the Will of the Husband, and as is commonly said, a Feme Covert has not any Will; and therefore if the Will stands notwithstanding the Intermarriage, her Countermand afterwards is of no Force nor Effect, *quod fuit concessum per tot' Curiam* as to this Point: Further it was objected, That notwithstanding that after the Marriage the Wife could not revoke her Will, so that now after the Marriage it is irrevocable, yet that is no Reason that the Intermarriage should be a Countermand; for if a Man of sound (c) Memory makes his Will, and afterwards becomes *non compos mentis*; in that Case until the Time of his Death, after that he became of nonsane Memory, he cannot countermand his Will, and yet the Disability or Imperfection of nonsane Memory, was not any Countermand of it. 4. It was said

(a) 1 And. 187.
Co. Lit. 310. a. b.
Goldsb. 110.
1 Vent. 186.
1 Roll. 299.
Kew. 163. a.
Cr. El. 270.
1 Mod. Rep. 92.
11 H. 7. 19 b.

(b) Godb. 15.
Mo. 123. Goldsb.
109. 110. Co. Lit.
112. b. Br. Dev.
34. ver. N. E. 86. b
1 Sid. 17. Ance
51. b. 242. 251. H. 8.
cap. 5. Plowd. 344
a. Perk. Sect. 501.
502. Br. Testam. 9
13. 21. Dy. 143.
Pl. 56. 354. Pl. 34.
18 E. 4. 11. b. 12. a.
Br. Conscience 28
Swinb. 56. 57.
3 Leon. 81. 82. 83.
4 Leon. 148.
Godb. 143. 144.
2 Brown. 228.

(c) 1 And. 187.
Goldsb. 109.

FORSE and HEMBLING's Case. PART IV.

that Countermands of Wills are not favour'd in Law; and therefore forasmuch as there is no Book in Law in this Point, but the said Case of Attornm. adjudg'd is all one in with the Reason with this Case; for these Causes it was concluded, that Judgment should be given against the Pl. But it was upon great Deliberation adjudg'd for the Pl. And in this Case it was unanimously agreed upon the whole Matter, *f.* The taking of Husband, and Coverture at the Time of her Death, the Will was (a) countermanded, and that for two Reasons. 1. The making of a Will is but the Inception of it, and it doth not take any Effect 'till the Death of the Devisor, for *omne (b) Testament' morte consummat' est; & (c) voluntas est ambulatoria usque extremum vite exitum*: Then it would be against the Nature of a Will to be so absolute, (d) that he who makes it, being of good and perfect Memory can't countermand it: and therefore this taking of Husband being in the Case at Bar her proper Act, shall amount to a Countermand in Law: But when a Man of sound Memory makes his Will, and afterwards by the Visitation of God, becomes of unsound Memory (as every Man for the most part before his Death is) God forbid that this Act of God should be in Law a Revocation of his Will, which he made when he was of good and perfect Mem. 2. It would be mischievous to Women, that after their Intermarriages they could not for no Cause countermand their Wills. 3. As the Law will not allow any Custom, That a Feme Covert may make any Devise, for the Presumption that the Law has, that it will be made by Constraint of the Husband, as it is adjudg'd in (e) 3 E. 3. So if it was in the Power of the Wife after her Marriage to revoke her Will, the Law would not suffer the Continuance thereof after Marriage, forasmuch as the Husband by Constraint may cause her against her Will to revoke or continue it. And as to the said Case of (f) Attornment, it was said in 2 R. 2. that when the Woman in the same Case by her Deed sealed and deliver'd by her, granted the Reversion to another, it took such Effect against herself, that she herself could not by any Words countermand it before or after the taking Husband, and therefore it is not like the Case of a Will, and therefore it might well be, that inasmuch as her Grant by Deed stood in Force after the taking of the Grantee to Husband, that it shall not be any Countermand.

(a) 5 Co. 10. a.
1 Jones 388.
1 And. 181, 182.

(b) 3 Co. 29. b. 32. a.
34. a. 6 Co. 76. a.
(c) Co. Lit. 112. b.
(d) 1 And. 182.
Goldsb. 110.
8 Co. 82. a.
March Arbit. 165.
Bacon's Max. reg.
19.

(e) 1 Sid. 17.
Antea 61. a.
3 E. 3. Demise 12.

(f) 1 And. 181.
Co. Lit. 310. a. b.
Goldsb. 110.
1 Vent. 186.
1 Roll. 399.
Keltw. 163. a.
Cr. El. 270.
1 Mod. Rep. 91.
Bridgm. 85.
11 H. 7. 19. b.

Pascha 31 Regina ELIZABETHÆ.
In the King's-Bench.

HERLAKENDEN's Case.

Robert Ivy brought an Action of Trespafs against Roger 11 Co. 52. a.
Herlakenden, Esq; for breaking of his Close, s. 380 Acres
Parcel of Colme-Park in Colme in the County of Essex,
and 300 Oaks, 300 Ashes, 300 Maples, and 100 Beeches there
growing cutting, and 1000 Load of Wood and Under-
wood carrying away, &c. and the Def. as to the whole Trespafs,
prater fraction' clausorum, necnon prater succision' 200 quercuum,
10. fraxinorum, & 10. acer' parcel, &c. pleaded not
guilty; *Et quoad fractionem clausorum prad' ac herba pradict' pedibus ambuland' conculcat', & consumption'*; The Def. pleaded
the Matter in Law which follows, by which he entitled
himself to the same Land, and justified the cutting of the
Trees, but in the *quod, &c.* (as appears before) the Trespafs
as to the Trees was utterly omitted, and so in Law nothing
pleaded thereto; and then the Demurrer being joyn'd, the
whole is discontinu'd, as it is agreed in 7 H. 6. 27. a. *Vide*
27 H. 8. 1. & Dyer 9 Eliz. 264. 7 E. 4. 24. b. & 10. 7 H. 6.
5. a. And therefore to the Intent the Matter in Law might
appear, by Assent the Def's Plea was amended. For it was
agreed *per totam Curiam*, that all was (a) discontinu'd, and (a) 1 Roll. 487.
thereupon the Roll was amended: *Et quoad succisionem arborum,*
&c. was inserted. And the Matter in Law in Effect, 488. 1 Roll. Rep.
was such, Edward Earl of Oxford was seised of Colme-Park 176, 177. 11 Co.
in Essex, in Fee, and 17 Eliz. leased to Tho. Barefoot, Tho. Luter and John Collins, the said Park (except the Trees in the
Declaration mention'd) for 21 Years; John Collins assign'd his
Interest to Anthony Luter, and afterwards the Earl sold
to the said Barefoot, Luter and Luter the Trees afore-
said, who 15 Julii, anno 26 Eliz. leased the said 380
Acres

HERLAKENDEN's Case. PART IV.

Acres of Land and Pasture, Parcel of the Park aforesaid (upon which the Trees aforesaid grew) to one *John Bragge* for 11 Years; and afterwards in August 26. *Eliz. Barefoot*, *Luter* and *Luter* sold the said Trees to the Defendant; and afterwards, 27 *Eliz. Bragge* assigned his Interest to the Pl. and afterwards the Defendant cut down the Trees, and if this cutting down was lawful or not was the Question. And the Point was, When a Man leases his Land for Years excepting the Wood, and afterwards the Lessor grants the Wood to the Lessee, if now the Wood is so united again to the Land, that by the Lease of the Land the Wood shall pass as a Thing annexed to it, or if the Wood remains as an Interest distinct and severed from the Land, so that by the Lease of the Land it shall not pass to the Lessee; and in this Case divers Points were resolved: 1. When a Man makes a Lease for Life or Years, the Lessee has but a special Interest or Property in the (a) Trees being Timber as Things annexed to the Land, so long as they are annexed to it: But if the Lessee or any other severs them from the Land, the Property and Interest of the Lessee is thereby determined, and the Lessor may take them as Things which were Parcel of his Inheritance, and in which the Interest of the Lessee is determined. In an Action of Wast for cutting down of Trees against Lessee for Life or Years, the Writ saith *ad exharedationem*, and it would be absurd that the Lessee who has but a particular Interest in the Land, should have an absolute Property in any Thing which was Parcel of the Inheritance: At the Common Law, if Tenant in Dower, or Tenant by the Curtesie cut down Trees, he in Reversion might take them, yet their Estate is as high as Lessee for Life: But the Lessor should not have an Action of Wast at the Common Law against the (b) Lessee, because it was his own Act, and it was his Folly to make a Lease to him who ought to do him Fealty, and yet will commit Wast: It was also his (c) Folly that in his Lease he would not provide by Condition or Covenant that he should not commit Wast, or to prevent it by Exception. If I lease my Land for Life, (d) and afterwards give the Trees, and afterwards the Lessee dies, yet the Donee can't take them, as it is held *per totam Curiam* in 21 H. 6. 46. d. because at the Time of the Gift the Lessee had the Property in them as annexed to the Land. And Sir *Christopher Wray C. J.* said a Case between *Moyle Finch* Esquire, and *Madam Finch* his Mother was now lately referred to him and Sir *Roger Manwood* Chief Baron, which in Effect was, That *Madam Finch* had an Estate for Life in certain Land without Impeachment of Wast, and the said *M.* had the Inheritance expectant, *Madam Finch* cut down divers Trees growing upon the

(a) 5 Co. 76. b.
 11 Co. 48. b.
 31. b. Cro. Car.
 242, 274. 2 Rol.
 119. 1 Rol. Rep.
 181. O. Benl. 113.
 Palm. 327. Mo.
 19. 10 H. 7. 2. b.

(b) 5 Co. 13. b.
 6 Co. 43. 2.
 11 Co. 81. b.
 Cro. El. 777.
 2 Inst. 299.
 Sa. 2 Glouc.
 cap. 5. Dr. &
 Sud. 60. 2.
 (c) Dr. & Sud.
 60. 2.

(d) 11 Co. 47. 2a.
 48. b. Cro. Car.
 274. Mo. 9.
 Palm. 328. Br.
 Done & Remain-
 der 13. 1 Rol.
 Rep. 97.

the said Land; The Question was, if the said *Moyle* might lawfully take the said Trees, or if they of Right belong'd to his Mother; And upon Conference had with divers other Justices they resolv'd: 1. That if the said Estate had been made for Life without any such Clause of without Impeachment of Wast, that without Question the said *M.* should have the Trees, because they were Parcel of his Inheritance, and that the Interest which the Tenant for Life had in the Trees, was by the Severance from the Land determined, because she had them as Things annexed to the Land. 2. In the same Case it was resolv'd, That the said Clause of without ^(a) (a) 11 Co. 63. 2. 82. b. 9 Co. 9. 2. Dyer 184. pl. 63. 1 Roll. Rep. 182. 183. 2 Roll. Rep. 325. 2 Roll. 835. Co. Lit. 220. Hob. 132. Larch. 269. 270. 2 Inst. 146. Moor 18. 317. 327. 2 Co. 23. a. 72. a. Poph. 193. 194. 195. Dyer 47. pl. 11. Bridgm. 102. Plowd. 135. b. Cro. Jac. 216. Heil. 77. (b) 8 Co. 152. 2. Co. Lit. 286. a. b. Lit. Sect. 496. Impeachment of Wast gave the Tenant for Life no greater Interest in the Trees then she had by the Demise of the Land, but it shou'd serve only that she shou'd not be impeached in any Action of Wast, either to recover Damages, or the Place wasted; As if I grant to one that he shall not be impeached for cutting of all my Trees in such Woods, it shall excuse him in any Action brought against him for the cutting, but notwithstanding that the Property and Interest remains in me, for no Property or Interest is thereby given him. So if a Man disseises me of my Land or dispossesses me of my Goods, and I ^(b) release to him all Actions, yet I may enter into my Land, or take my Goods, for the Discharge of my Action is no Bar of my Right; and therewith agrees *Litt. cap. Releases* 115. and all this was said and reported by the said *Sir Chr. Wray. Vid.*

27 ^(c) (c) Dyer 184. pl. 63. 1 Roll. Rep. 183. 11 Co. 83. a. 4 Leon. 141. Poph. 194. Moor 321. (d) 6 Co. 41. 2. 9 Co. 139. 2. 11 Co. 80. 2. Co. Lit. 27. b. 1 Roll. Rep. 100. 179. 184. F. N. B. 59. P. 39 E. 3. 16. a. b. Dr. & Stud. lib. 2. c. 7. Lit. Sect. 34. 12 H. 4. 3. b. 4. 2. 10 H. 6. 1. b. 45 E. 3. 25. 2. 18 E. 3. 32. a. b. 11 H. 4. 14. b. 15. a. 11 H. 6. 1. b. 2 Roll. 825. 828. West. Symb. 180. b. 2 Inst. 202. 306. (e) 11 Co. 81. b. 82. a. 1 Roll. Rep. 181. Co. Lit. 53. b. (f) Postea 87. a. (g) 11 Co. 81. b. *H. 6. Wast.* 8. where it is said, if a Man leases Land *absque impetitione vassi*, and a Stranger cuts down Trees, and the Lessee brings an Action of Trespass, he shall not recover Damages for the Value of the Trees, because the Property is to him in the Reversion, wherefore the Lessee shall recover but for the cropping and breaking of the Close: And it was said, That if Tenant in Tail after Possibility of Issue extinct sells the Trees, the Lessor shall have them: for in as much as he has but a particular Estate for Life in the Land, he can't have an absolute Interest in the Trees, but he shall not be punished in ^(d) Wast, because his original Estate is not within the Statute of *Gloucester cap. 5.* 2. It was resolv'd that if the House falls by Tempest, ^(e) or other Act of God, the Lessee for Life, or Lessee for Years has a special Interest to take the Timber to build the House again if he will for his Habitation: But if the Lessee ^(f) pulls down the House, the Lessor may take the Timber as a Thing which was Parcel of his Inheritance, and in which the Interest of the Lessee is determined, as in Case of Trees and for the same Reason; and notwithstanding he may have an Action of Wast and recover treble Damages: *Vide* 44 *E. 3.* 5, & 6, & 44. 29 *E. 3.* 42. 2 *H. 7.* 14. *per Brian.* 10 *H. 7.* 2. 13 *H. 7.* 9. 21 *E. 4.* 52. 1. *Mar. Dyer* 90. 2 *Eliz. Dyer* 194. 3. It was resolv'd, That if ^(g) Trees

HERLAKENDEN'S Case. PART IV.

- (a) 11 Co. 81. b. being Timber are blown down by the Wind, the (a) Lessor shall have them (for they were Parcel of his Inheritance) and not the Tenant for Life or Tenant for Years: But if they be Dotards without any Timber in them, the Tenant for Life or Tenant for Years shall have them. *Vide 40 Ass. 22.* that Guardian (b) in Chivalry shall not have Windfals; and so the *Quere* in 7 H. 6. 38. well satisfied. 4. Point was, when the Earl leased the Land for Years excepting the Trees, by which they were severed from the Possession of the Land during the Term, then after the Lessor granted the Trees to the Lessee, if now they be reunited to the Possession of the Land so that when the Term ended the Lessor should have them again as Things annexed to the Land. And it was resolved, That the Lessee had in Judgment of Law absolute and divided Property in the Trees, (c) so that by the Lease of the Land they should not pass, and therefore this Difference was taken: If I enfeoff you of my Land (except the Trees) to have and to hold to you and your Heirs, now the Trees in Property are divided from the Land, altho' *in facto* they remain annexed to the Land, for if one cuts them down and carries them away it is not (d) Felony: And therefore in such Case if the Feoffor grants the Trees to the Feoffee, they are reunited as well in Property as they are *de facto*, and the Heir of the Feoffee shall have them, and not the Executors, for the Feoffee had absolute Ownership in both, so that it is not any Prejudice but rather a Benefit to him that they are reunited to the Land. But in the Case at Bar he had but a Term for Years in the Land, so that he had not Equality in Ownership in both, and it would be a Prejudice to him, that during the Term he could not sell them, but should be punished in Waste and after the Term should lose them, and it would be (e) against Reason that the Lessor should against his own Grant have them again. It was also said, That *Barefoot, Luter and Luter* were Tenants in Common of the Land, and they were Joynt-tenants of the Trees, and so their Interest divers and of several Qualities, therefore there could not be an Union between them. *Nich. Fuller and Tanfield* were of Council with the Pl. and *Egerton* the Q's Solicitor and *Coke* with the Def.
- Nota Reader, Mich. 18 & 19 Devon's*; It was adjudged in *C. B.* that Waste might be committed in (f) Glass annexed to Windows, for it is Parcel of the House, and shall descend as Parcel of the Inherit. to the Heir, and that the Executors should not have them; And altho' the Lessee himself at his own Costs put the Glass in the Windows, yet it being once Parcel of the House he could not take it away, or waste it, but he should be punished in Waste; And upon the said Judgment a Writ of Error was brought in *B. R.* and there the Judgment was affirmed. *Nota also inter Warner & Fleetwood, Mich. 41 & 42 Eliz. in C. B.* it was resolved *per totam Curiam*; that Glass
- (a) Moor 317.
- (b) Ley 74.
- (c) Goldsb. 188.
11 Co. 50. 2.
Owen. 49. Cro.
Jac. 458, 459.
Cro. El. 522.
1 Roll. Rep. 101.
- (d) 2 Brownl. 197.
- (e) Hob. 173.
- (f) Moor 178.
Swinb. 132, 345.
Co. Lit. 53. a.

Glas annexed to Windows by Nails, or in other Manner by the Lessor or by the Lessee could not be removed by the Lessee, for without Glas it is no perfect House; and by Lease or Grant of the House it should pass as Parcel thereof, and that the Heir should have it, and not the Executors; and peradventure great Part of the Costs of the House consists of Glas, which if they be open to Tempests and Rain, Wast and Putrefaction of the Timber of the House would follow, which agrees with the Judgments given before. It was likewise then resolved, That Wainscot, be it annexed to the House by the Lessor or by the Lessee, is Parcel of the House: and there is no Difference in Law if it be fasten'd by great Nails, or little Nails, or by Scrues, or Irons put through the Posts or Walls (as have been invented of late Time;) But if the Wainscot is by any of the said Ways, or by any other fastned to the Posts or Walls of the House, the Lessee cannot remove it, but he is punishable in an Action of Wast, for it is Parcel of the House, and by the Lease or Grant of the House, in the same Manner as the feeling and plaistering of the House, shall as Parcel of it.

Co. Lit. 53. 2.
 1 Rolls Rep. 216.
 Swinb. 346, 132.
 Owen 70, 71.
 20 H. 7. 13. b.
 Moor 177, 178.

Hill.

 Hill. 33 ELIZABETHÆ Regina.

FULWOOD's Case.

Between *Cartwright* Plaintiff, and *Roberts* Defendant, in *Ejectione firmæ* of Houses in *London* upon a Demise made by *Sara Sharington, &c.* Upon Not guilty pleaded, the Jury gave a special Verdict to this Effect; *T. Castle* was seised of the Houses aforesaid, and *primo Eliz.* took a Wife, and afterwards *1 Eliz.* before the Mayor and Aldermen of *London* acknowledged a Recognizance of 250 *l.* to the Chamberlain of the City of *London* and his Successors, according to the Custom for Orphanage Money; And afterwards, *5. 8 El.* the said *Castle* came before the Recorder of *London* and Mayor of the Staple, and acknowledged *se debere* 200 *l.* to *Sir Thomas Rivet*, And afterwards *anno 10 El.* *Sir Thomas Rivet* sued Execution upon the said Statute, and *Liberate*; upon which the Sheriff delivered the said Houses amongst others to the said *Sir Thomas* (but it did not appear that the *Liberate* was returned;) And afterwards the Successors of the said Chamberlain sued Execution in *London* by a Precept in Nature of an *Elegit* directed to one *Flick* Serjeant of the Mace, and Officer of the said Court, who by Force thereof delivered the said Houses among others for one Moiety to the Chamberlain aforesaid; And afterwards *Tho. Castle* died, and after his Death his Wife recovered Dower, and had the said Houses assigned her for her third Part to hold in Dower, and she died in *an. 18 El.* and afterwards the said Chamberlain assigned over his Interest to one *Fulwood*, and afterwards *21 Eliz.* *Sir T.* assigned over his Interest to the said *Fulwood* also: *Anno 29 Eliz.* the Heir of the said *Castle* demised to *Guilbert Sharington* the said Houses for Years, who demised to the Lessor of the Plaintiff, upon whom the Defendant by Title derived from the said *Fulwood* enter'd, &c. And if the Entry of the Def. was lawful or not, was the Question. And in this Case 8 Points were unanimously resolv'd by *Sir Christopher Wray*

Wray Chief Justice, and the whole Court. 1. That whereas, it was objected that in Case of a sole Corporation or Body Politick, be it created by Charter or Prescription, as Bishop, Parson, Vicar, Master of an Hospital, &c. no (a) Chattel either in Action or in Possession, shall go in Succession, but the Executors or Administrators of the Bishop, Parson, &c. shall have them, no more than the Heir of a private Man can have them; for Succession in a Body Politick is Inheritance in Case of a Body private. But otherwise it is in Case of a Corporation (b) aggregate of many, as Dean and Chapter, Mayor and Comminalty, and the like, for there they in Judgment of Law never die. And all this was affirmed *per tot' Curiam*, 8 E. 4. 18. & 20 E. 4. 2. a. Wherefore it was concluded, that the Chamberlain of London being a sole Corporation, that his Successor could not have the said Recognisance acknowledged to his Predecessor; yet it was resolved, that the (c) Successor should have it, for in this Case the Corporation of the Chamberlain was by Custom, and the same Custom which has created and made him a Corporation in Succession as to this special Purpose concerning Orphanage, has enabled his Successor to take such Recognisances, Obligations, &c. which are made to his Predecessor, and such Custom is grounded upon great Reason, for the Executors or Administrators of the Chamberlain ought not to intermeddle with such Recognisances, Obligations, &c. which by the said Custom are taken in the corporate Capacity of the Chamberlain, and not in his private Capacity: But a Bishop, Parson, &c. or any sole Corporation which are Bodies Politick by Prescription, can't take a Recognisance or Obligation but only to their private, and not in their politick Capacity, for there wants such Custom (as is in the Case at Bar) to take a Chattel in their politick or corporate Capacity. 2. It was objected, That where the Statute of W. 2. cap. 18. which gives the (d) *Elegit*, provides, *Quod de cetero sit in electione illius, &c. quod vicecomes liberet ei omnia catalla, &c. & medietatem terra sua, quousque debitum fuerit levatum per rationabile pretium & extantum, &c.* That because the Statute gives Power expressly to the Sheriff to execute the *Elegit* by reasonable Extent, which is to be intended by (e) Inquisition of honest Men, and for as much as the Sheriff is a great Officer and sworn, &c. that the said Act by any strained Construction shall not be extended to a Serjeant at Mace (who is not sworn) to take a Jury, &c. and thereupon the Books in 7 H. 6. 35. 14 E. 2. *Redisseisin* 9. & 32 H. 6. 25. were cited, That an Action of Wast nor *Redisseisin* doth not lie in (f) ancient Demesne, because the Enquiry of Wast, and the Proceeding in *Redisseisin* is appointed by the Statutes to be made by the Sheriff, and in

(a) 1 Rolls 515;
Heib. 64. 12 Co.
105. Co. Lit. 9. a.
46. b. 90. a. Br.
Corporation 608
a 20 E. 2. 4. 2.
Dyer 48. pl. 15.

(b) Dyer 48. pl.
15. 27 He 8. 15. a.

(c) Cr. Eliz:
464. 3. 682.
1 Rolls 515. Cr.
120. 159.

(d) 2 Infl. 394;
395.

(e) Postea 67. 2;
74. b. 2 Infl. 396a
Cr. Jac. 569.
Dyer 100. pl. 71a
2 Bulltr. 97. Cr.
El. 584. Dall.
28. pl. 1.

(f) 2 Sand. 254;
Owen 24. 1 Roll
223. Doct. pl. 52a

ancient Demefn there is not any Sheriff, and the Bailiff who is Officer in ancient Demefn thall not fupply the Place of the Sheriff. But it was refolved by the whole Court, that the Execution was well enough, for the Statute which provides, That Procefs fhall be made to the Sheriff, by Equity is

(a) Cr. Car. 319.
Hob. 83.

to be extended to every (a) other immediate Officer to every Court of Record of the King, and *eo potius*, becaufe the Statute of *W. 2. cap. 18.* couples the *Elegit* with the *Fieri facias*, and limits both to be executed by the Sheriff; and yet without Queftion the Serjeant at Mace in the Cafe at Bar may execute a *Fieri facias*: And it is not like the Cafe of Waft, for the Statute of *W. cap. 14.* provides that *in*

b) 2 Inft. 390.
Dyer 204. pl. 1.

(b) *propria perfona accedat ad locum vafatum*; So that the perfonal Appearance of the Sheriff is requifite, and in the Cafe of Rediffeifin the Sheriff is (c) Judge, and therefore not like. 3. Where it was further objected, that the Execution upon the *Elegit* was not lawful, for as much as Sir *Th. Rivet* was in by Matter of Record whereof he ought to take Notice, and to have fued *Scire facias* againft him, in Proof of which the Books in 9 *E. 4. 24.* & 2 *R. 3. 8.* *Simpfon's Cafe*, were recited. But it was refolved *per totam Curiam*, That the Execution upon the *Elegit* was good enough: But it was faid, if the Sheriff had returned the former by Extent, and the Matter had appeared to the Court, the Plaintiff (d) ought to have had a *Scire facias*; But the whole Court faid, if the Sheriff levies Execution it is good enough, *vide* for that 22 *E. 3. 7. 4.* It was objected, that here was no Statute or Recognifance in Nature of a Statute fufficiently found, for the Jurors have found, That the faid *Tho. Caffle Veniebat coram R. O. Recordatore civitatis London,*

(c) 10 H. 7. 2. a.

& *Tho. O. majore ftapula,* & *recognovit fe debere Tho. Rivet militi 200. l.* and doth not fay, *fecundum formam* (e) *Statuti,* &c. *nec per fcriptum obligatorium,* &c. where the Statute of 23. *H. 8.* provides that it fhall be by Bill Obligatory fealed with 3 Seals. But it don't appear by the Verdict, that there was any Bond or any Seal, neither doth it appear by any Word of the Verdict, that it was made according to the Stat. &c. And it was faid, that altho' Verdicts being the Words of Lay Men fhall be taken according to their Meaning, and there need not be fo precise Form in them as in Pleading, yet the Substance of the Matter ought to appear either by exprefs Words, or by Words equipollent, or tant-amount, fo that there ought to be convenient Certainty, which if it be falfe the Party for fuch Falfity may have his Attrait: But it was refolved, that the (f) Verdict is good enough, for in as much as they have found a Recognifance before the Mayor and Recorder, &c. it fhould be in a Verdict of Laymen intended according to the Statute, for otherwife they could not take any Recog. and alfo the whole Sequel of the Verdict implies that this was a Recognifance in the Nature of a Statute,

(d) Cr. Jac. 478.
2 Rolls 473.

(e) *Statuti,* &c. *nec per fcriptum obligatorium,* &c. where the Statute of 23. *H. 8.* provides that it fhall be by Bill Obligatory fealed with 3 Seals. But it don't appear by the Verdict, that there was any Bond or any Seal, neither doth it appear by any Word of the Verdict, that it was made according to the Stat. &c. And it was faid, that altho' Verdicts being the Words of Lay Men fhall be taken according to their Meaning, and there need not be fo precise Form in them as in Pleading, yet the Substance of the Matter ought to appear either by exprefs Words, or by Words equipollent, or tant-amount, fo that there ought to be convenient Certainty, which if it be falfe the Party for fuch Falfity may have his Attrait: But it was refolved, that the (f) Verdict is good enough, for in as much as they have found a Recognifance before the Mayor and Recorder, &c. it fhould be in a Verdict of Laymen intended according to the Statute, for otherwife they could not take any Recog. and alfo the whole Sequel of the Verdict implies that this was a Recognifance in the Nature of a Statute,

(e) Hob. 55.
2 Rolls 700. Cr.
Car. 363.
2 Vent. 3.
Raym. 150.
Vaugh. 102.

(f) *Statuti,* &c. *nec per fcriptum obligatorium,* &c. where the Statute of 23. *H. 8.* provides that it fhall be by Bill Obligatory fealed with 3 Seals. But it don't appear by the Verdict, that there was any Bond or any Seal, neither doth it appear by any Word of the Verdict, that it was made according to the Stat. &c. And it was faid, that altho' Verdicts being the Words of Lay Men fhall be taken according to their Meaning, and there need not be fo precise Form in them as in Pleading, yet the Substance of the Matter ought to appear either by exprefs Words, or by Words equipollent, or tant-amount, fo that there ought to be convenient Certainty, which if it be falfe the Party for fuch Falfity may have his Attrait: But it was refolved, that the (f) Verdict is good enough, for in as much as they have found a Recognifance before the Mayor and Recorder, &c. it fhould be in a Verdict of Laymen intended according to the Statute, for otherwife they could not take any Recog. and alfo the whole Sequel of the Verdict implies that this was a Recognifance in the Nature of a Statute,

(f) Hard. 473.
Hob. 55, 56, 262.
2 Rolls 700.
Raym. 150.
Lanc 40. 1 Siderf.
27. 3 Co. 9. 2.
Cr. Car. 363.
Vaugh. 102.

it was refolved, that the (f) Verdict is good enough, for in as much as they have found a Recognifance before the Mayor and Recorder, &c. it fhould be in a Verdict of Laymen intended according to the Statute, for otherwife they could not take any Recog. and alfo the whole Sequel of the Verdict implies that this was a Recognifance in the Nature of a Statute,

or otherwise no Execution could be sued thereupon in the Chancery. 5. It was objected when the Wife of the Conusee recover'd Dower, and thereby the Possession of the Conusee was evicted, and also when a greater Term in the Moiety was evicted by Force of the *Elegit* than the Conusee had; for (for Example) the Extent upon the Statute if no Eviction had been incurred in 13 Years; and the Moiety which was evicted by the *Elegit* wou'd be subject to Execution by Force of the *Elegit* for 15 Years; so that a greater Term was evicted by *Elegit*, and a greater Estate was recovered by the Writ of Dower than the Conusee had, and therefore he shou'd be put to his *Scire facias* upon the Statute of 32 H. 8. cap. 5. (a) for otherwise great Mischief would ensue, for if the Conusee should hold over after the Death of the Tenant in Dower, and after the Extent upon the *Elegit* incurred, then during the Life of the Tenant in Dower, and during the Execution upon the *Elegit*, the Conusee might sue a new Execution upon the said Statute, and so have double Remedy, which never was the Intention of the Statute. But it was resolved *per totam Curiam* that in this Case the Conusee could not have any Help of the said Statute, for in as much as but Part was evicted, *s.* the Moiety upon the *Elegit*, the Conusee should not only hold over the other Moiety, but also after the Death of the Tenant in Dower, and the Extent upon the *Elegit* ended, he should re-enter into the said Land so evicted, and therof. he is not helped by the said Act, for the said Act will not help but when the Conusee is put clearly without Remedy to obtain any Part of his Debt: As where the whole Execution is avoided by Title paramount for ever. And that appears by the express Words of the Preamble, for the Words of the Preamble are; *By Reason whereof the Obligees, Reconusees and Recoverers have been thereby set clearly without Remedy by any Manner of Suit of Law.* And the Body of the Act refers to the Preamble, *scil. such Lands, &c.* In the Body of the Act it is said, *Any such Lands, Tenements or Hereditaments, as be or shall be had or delivered in Extent,* and doth not say, *or any Part thereof*: And it is provided that new Execution shall be done; *for the levying of the Residue of all such Debt and Damages as then shall appear to be unlevied, &c.* And that can't be when but Parcel of the Land extended is evicted; for by the Common Law the Conusee in such Case is not without Remedy, but the Conusee shall hold the Residue of the Land over, till the Residue of the Debt shall be satisfy'd; and therefore if he shou'd have his Remedy also upon the said Stat. he wou'd have double Satisfaction, which wou'd be inconvenient: And if the Conusee has Remedy eith. *in præ* for Part, or *in futuro* for all, or Part, the said Act of 32 H. 8. doth not extend to it. 6. It was objected that when Sir T. had Execut. (*exem' gra'*) of 4 Houses, and the Extent of that by Course of time would endure for 13 Years and afterw. 2 of the said Houses are evicted by *Elegit* for 15

(a) 2 Inst. 677, 678, 679, 680. Co. Lit. 289. b. 290.

Co. Lit. 289. b. Cr. Jac. 694.

Co. Lit. 289. b. 5 Co. 87. a.

Co. Lit. 285. b.

Co. Lit. 289. b.

Years, and afterwards Sir *T. Rivet* assigned over all his Interest in the Execution upon the Statute to *Fulwood*, that this Assignment as to the two Houses so evicted was void, for in that a greater Term was evicted than the Conufee had for the Moiety, and then at most the Conufee had but a Possibility which could not be assigned over. And a Case adjudged now lately in *C. B.* was cited, which was such in Effect; A Man possessed of a Term for divers Years, devised the Profits thereof to one for Life, and after his Decease to another for the Residue of the Years, and died, the first Devisee enter'd by the Assent of the Executor, and afterwards he in the Remainder during the Life of the first Devisee assigned it to another, and afterwards the first Devisee died; it was adjudged that the Assignment was void, for he in Remainder had but a (a) Possibility during the Life of the first Devisee; for it is as much in Law, as if the Land had been devised to him for so many of the Years as he should live, or for the whole Term if he should live so long, so that the Interest of the Term *sub modo* is in him, and the other in Remainder has but a Possibility which he can't grant over: But it was resolved, That in the Case at Bar, the Conufee had an Interest in the two Houses which were evicted, for it was agreed by them, if a Man is bound in two Statutes, and the latter Statute is (b) first extended and delivered in Execution, and afterwards the first Statute is put in Execution for greater Time, and for a greater Sum than the first was, yet when the first Stat. is satisfied, and his Interest lawfully determined, the 2d Conufee shall have the Land again by Force of the first Extent: and so in the Case at Bar, when a Moiety was evicted for 15 Years by Force of the *Elegit*, now by Computation the Conufee of the Stat. shall hold the other Moiety for 15 Years, and after the 15 Years expired, the whole Land, until the whole Debt upon the Stat. is satisfy'd: So that it is not a Possibility, nor so uncertain but that by Computation it may be by reasonable Intendment made certain: *Et id (c) certum est, quod certum reddi potest*: And altho' Casualties and sudden Accidents may happen, yet *Casus fortuitus non est sperandus, & (e) nemo tenetur divinare*. It was also resolved, that if the Conufee is ousted by Wrong by the Conufor, or any other who has the immediate Estate, that the Conufee shall hold (f) over. So when the Wife (g) of the Conufor recover'd Dower, the Conufee shall hold over, for she claimed by her Husband: The same Law if a Man makes a Lease for Life or for Years, and (h) afterwards disseises his Lessee for Life, or ousts his Lessee for Years, and acknowledges a Stat. or Recognizance upon which Execution is sued, and afterw. the Lessee for Life enters and dies, or the Years expire, the Conufee shall re-enter and hold over; And such Eviction for a Time is not within the said Act of 32 H. 8. because the Conufee has Remedy *in futuro*. 7. It was objected that for as much as the *Liberate* was not returned,

(a) 10 Co. 47. b.
Carter's Case.
2 Brownl. 175.
1 Bullstr. 192.
193. Raym. 146.
Palm. 48. 2 Rolls
Rep. 129. Cr.
Jac. 510. Palm.
374.

(b) Palm. 272.

(c) 5 Co. 5. 2.
Co. Lit. 45. 2.
96. a. 142. a.
9 Co. 30. a. 47. a.
Lane 51. Herly.
98. 2 Brownl.
336. 5 Co. 6. a.
(d) Hard. 82.
Lit. Rep. 98.
(e) Antea 28 a.
Lit. Rep. 98.
(f) Co. Lit.
289. b.
(g) Co. Lit.
289. b.
(h) Co. Lit. 289. b.

Execution was not lawfully done, for in as much as Tenant by Statute Merchant is Tenant by Matter of Record, the *Liberate* ought to be returned, or otherwise he will be Tenant by Matter in fact in *pais*, and not by Matter of Record. Also the *Liberate* ought to be returned, or otherwise the Time of the *Liberate* made will not appear, and the Term of the Conufee shall begin from the Time of the (a) ^(a) Cr. El. 463. *Liberate* executed, *quod vide* 33 H. 8. tit. Statute 41. 2. It appears by the *Liberate* that the Conufee shall be satisfied for all his Costs and Damages *quæ tunc, s. tempore* of the Delivery of the Land to the Conufee *suffinit*, so that the Time of the Delivery is material and ought to appear of Record. 3. If the Terre-Tenant shou'd be driven to sue a *Scire fac'* after the Extent incurred by Course of Time, the *Liberate* ought to appear of Record, so that it might appear to the Court that the Time is past. 4. It was said, that it would be dangerous to Purchasors, for they could not know of the Execution by any Search, if the Execution don't appear of Record: But it was resolved *per totam Curiam*, that the Execution of the *Liberate* was well enough, altho' the Writ was not (b) returned, for the Writ is not conditional, but has these Words, *Et qualiter hoc præceptum, &c.* and is stronger than the Case of the *capias ad satisfaciendum*, for there are Words conditional, and yet the Execution is good altho' the Writ is not returned; So of *Habere facias seisinam*, and generally of all other Writs of Execution which are the most final Process, and after which no Judgment is to be given, nor no farther Process had: *Vide Pascha* 13 Eliz. *inter Rorley & Borley*, 17 Aff. 24. 32 E. 3. 101. tit. *Scire fac'*, 19 E. 3. *Scire facias*, 120. 20 H. 6. 24. 21 H. 6. 5. b. 11 H. 4. 57. b. But it was said, that this Case was not like the Case of *Elegit*, where an (c) Inquisition was to be taken, for there the Writ ought to be returned, to the Intent that the Court shall judge upon the Sufficiency or Insufficiency of that Inquisition; But it was agreed clearly, That where no Inquest was to be taken, but only Land to be delivered, or Seisin had, or Goods sold, &c. which were but Matters in Fact, these are good altho' the Writ is not returned: (d) But every Inquest taken by the King's Writ ought to be of Record, and not averrable by the Country. 8. It was objected that after the Extent upon the Statute Staple incurred by Course of Time, the Conusor might enter, and should not be put to his *Scire facias*; for altho' the Damages and Costs are uncertain, yet the Judges might adjudge and take Knowledge of them, for first the Time of the Conusans of the Statute appears, and for what Time the said Debt was withheld till the *Liberate*, so that they might well judge of the Damages and Costs; and therefore when by Course of Time as well the Debt

(b) 1 Leon. Rep.
280. Cr. Eliz. 17.
Moor 209.
2 Leon 11.
Godb. 82, 83.
Kelw. 3. a.
Litch. 223. 4 Co.
90. a.

(c) Postea 74. B.
2 Inst. 396. Cr.
Jac. 569. Dyer
100. pl. 71.
2 Bullstr. 97. Cr.
El. 584. Dall. 28.
pl. 1.

(d) 5 Co. 90. a.
Moor 57. Cr.
Jac. 569.

FULWOOD'S Case. PART IV.

as the Costs and Damages, and greater Sum is levy'd, the Conusor might enter: And Difference was taken when the Extent incurs by Effluxion of Time, and when by casual Profit; for when it is satisfy'd by casual Profit, he ought to have the Books in 32 E. 3. *Sci' fac'* 101. 11 H. 6. 7. 9 E. 4. 50. 2 R. 2. Execution 17, Fitz. 15 H. 7. 15. were cited. *Et vide* 30 H. 6. 1. b. 38 E. 3. 10. 14 H. 4. 9. That in Debt the Court may assess Costs and Damages without any Enquiry for the Reason aforesaid. But it was resolv'd by the whole Court, That in the Case at Bar the Conusor could not enter, for the Conusee shall hold the Land not only 'till he is satisfied for (a) Damages, &c. for the Detainer of the Debt, and for Costs of Suit, but also for his reasonable Labours and Expences, &c. for the Entry thereof is, *Tenendum ut liberum tenementum, &c. quousque debitum præd' una cum damnis & castigiis suis necessariis & rationabilibus, ut in laboribus, sectis, dilationibus, & expensis, &c.* which are incertain. And forasmuch as they are incertain, and the Conusee in by Matter of Record, Reason requires that the Conusor should bring a *Scire facius* against the Conusee before that his Estate shall be defeated: Also the Court of (c) Chancery which awards the Extent and *Liberate*, shall adjudge of the Reasonableness of the Costs, Damages, Labours, Expences, &c. as any other Court, And it was agreed by all, That in Case of *Elegit*, (d) the Conusor after Satisfaction had, might enter, for he should not have Damages, (e) Costs, nor other thing, but only the Land until the Debt is satisfy'd; and because all is certain, the Conusor after the Extent expir'd might enter: *Vide* the Statute *de Mercatoribus* 13 E. 1. the Statute of *Alton Burnel*, and the Statute of 27 E. 3. for Costs, and Damages upon the Statute Staple. And Judgment was given against the Plaintiff. *William Daniel, James Dalton*, and others were of Council with the Plaintiff, and *Edward Coke* and others with the Defendant.

(a) 2 Rolls 483.
2 Inst. 396.
Hard. 82.

2 Sand. 107.

(b) Cr. Car. 598,
599. 2 Rolls 479.
2 Inst. 678, 680.

(c) 2 Rol. 486.

(d) Cr. Car. 598.
2 Rol. 480.
Hard. 80.
2 Inst. 680.
(e) 2 Inst. 678.

Hill. 34 ELIZABETHÆ Regina.
Rot. 2380.

HYNDE's Case.

Brownlow.

ELizabertha Hynde sum' fuit ad respond' Rich. Libbe ar-
de placito quare cum de communi concilio regni dom'
Reg' Ang' provis' sit, qd' non liceat alicui vastum ven-
dition' seu destruction' facere de terr' domib', bosc' seu gardi-
nis sibi dimiss. ad term' vitæ vel annor'; ead' Eliz. de terr' &
bosc' in **Goring & Whitchurch**, quos tenet ad term' annor'
ex dimissione Ro. Garrard de præf. Rich' ex assignat' quam
Will. Hawe qui ill' præf. Rob. dimisit ad eund' term' inde fec'
præf. Ri. fecit vast', vendition', & destruction', ad exhæredita-
tion' ipsi Ric. & cont' form' provision' prædict' &c. Et unde
idem Ric. per Tho' Lane attorn' suum dic' qd' cum præd' W.
Hawe fuisset seisit' de uno mesuag' voc' **Hawe Place**, 200 acr'
terr', 10 acr' prati, 100 acr' past', & 50 acr' bosc' cum
pertinentiis in **Goring & Whitchurch** præd' in domino suo
ut de feodo: & sic inde scisit' existens 4 die Jan' ann' regni
dom' Reginae nunc 20 apud Goring præd' per quand' indent'
suam int' præd' Will' per nomen W. Hawe de **Hawe Place** in
paroc' de Goring in com' Oxon' yeoman ex una parte, & præd'
R. Garrard per nomen R. Garrard de **Herso** in com' Bucks
gen' ex alt' parte factam cui' alter' part' sigillo prædict' Ro-
bert' signat' idem Rich' hic in cur' profert, cui' dat' est eis-
dem die & anno, dimisit præfat. Rob. tenementa præd' cum
pert', except' (durant' vita Agn' Hawe matris ejusd' Wil.) tali
part' mesu' præd' parc' præmis. pomar' & gard', uno clauso voc'
Heaves Deane, & uno clauso voc' **Bell Close**, & pomar' voc'
the Orchard Bedell parcell' præmiss. qual' ead' Ag. tunc occu-
pavit, & ante tunc acceptasset & agreasset recipere pro dote
sua, de, in & pro tenementis præd' cum pertin': Habend' &
occupand' ead' tenem' cum pertin' (except' præexcept') eid' Ro.

& assignatis suis a festo Natalis Domini tunc ultimo præterito, usque finem & termin' 16 annor' extunc proxim' sequen' & plenarie complend', virtute cujus dimission' idem Ro. in præd' tenemen' cum pertin' superius in forma præd' dimiss. intravit, & fuit inde possession'; & sic inde possession' existens, 20 die Augusti anno regni dictæ dom' Reg' nunc 29 apud Goring præd' concessit totum statum interesse & termin' annor' sua quæ ipse tunc habuit ventur' de & in prædict' tenementis cum pertin' superius in forma præd' dimiss. præf. El. Hynde, virtute cujus concession' præd' Eliz. in eadem tenementa cum pertinen' superius in forma præd' dimiss. intravit & fuit inde possession', ipsaq; Eliz. sic inde possession' existen' ac prædict' Will. Hawe de reversione inde in dominico suo ut de feodo in forma præd' feisit' existen', idem Will. 7 die Martii anno regni dictæ dom' Reg' nunc 30 apud Goring præd' per quand' indenturam suam barganiæ & venditionis inter præd' Will' ex una parte, & eundem Rich' ex altera parte factam, cujus alteram part' sigillo præd' W. Hawe signat' idem Rich' hic in cur' profert, cujus dat' est eisdem die & anno ac in cur' dict' dom' Reg. de banco hic, scil. apud West. termino Paschæ anno regni dict' dom' Reg' 30 suprad' coram tunc Justic' ipsi dom' Reg' de banco præd' ut factum præd' Will' Hawe per ipsum Will. cognit', ac infra sex menses tunc proxim' sequen' scil. eodem termin' Paschæ debito modo in eadem cur' de recordo irrotulat' secund' form' statuti in hujusmodi casu edit' & provis. pro & in considerat' centum & viginti lib' præf. Will' per eundem Rich' ante tunc solut', barganizavit & vendidit eid' Rich' inter alia reversion' præd', habend' & tenend' sibi & hæredib' suis imperpetuum; quorum quid' barganiæ vendition' & irrotulamenti præd' prætextu ac vigore cujusdam statuti edit' in parlamento dom' H. nuper Regis Ang' 8. tent' apud West. in com' Midd' 4 die Februarii anno regni sui 27. de usibus in possession' transferend', idem Rich' fuit & adhuc feisit' existit de reversione præd' in dominico suo ut de feodo, ipsoq; Rich. sic inde feisit' existen', ac præd' Eliz. de tenementis præd' cum pertinen' sibi in forma præd' concess. in form' præd' possession' existen', ead' Eliz. fecit vastum, vendition' & destruction' de terr', viz. fodendo in 10 acris terræ in Goring præd' parcell' tenementorum præd' præfat' Robert' in forma præd' dimissor' cent' carectat' argill' prec' cujuslibet carectat' argilli inde 8 d. inde capiend' & vendend' de boscriam viz. succidendo & vendendo in quod' bosco voc' *Heigh grove*, contin' 10 acr' bosci cum pert' in Goring præd' parcell' tenemen.

tenementorum præd' cum pertinen' præfato Roberto superius in form' prædict' superius dimissorum ducent' quercus precii cujuslibet earum quinque solidorum per tot' contentum ejusdem bosci sparsim nuper crescen', ac in quodam alio bosco voc' *the Hedge Row*, jacent' in Goring præd', juxta præd' boscum voc' *Heighgrove* in Goring præd', parcell' tenementorum prædict' cum pertinent' in forma prædict' præf. Robert' dimissor' quadraginta quercus, precii cujuslibet earum sex solid' per totum content' ejusdem bosci sparsim nuper crescen', ac in quadam Copicia voc' *Home Coppice*, in Goring præd' parcell' tenementorum præd' cum pertin' præf. Rob. in form' prædict' superius dimissorum centum quercus precii cujuslibet earum decem solidorum in ead' copicia voc' *Home Coppice* similiter nuper sparsim crescen', ac in viginti acris pastur' voc' *the Hanging* in Goring præd' jacent' ibidem inter quoddam clausum voc' *Highgrove Hill*, & aliud clausum voc' *Dyker's grove Hill*, scil. parcell' tenementorum præd' cum pertinentiis præf. Roberto in forma præd' dimissorum decem quercus, precii cujuslib' earum decem solidor', sex fraxinos precii cujuslib' earum quinque solid', & decem fagos precii cujuslib' earum sex solidorum in eisd' viginti acr' pastur' similiter nuper sparsim crescen'. Ac in quadam sepe cujusdam clausi voc' *Home Field* in Whitchurch prædict' scil. parcell' tenement' prædict' cum pertinentiis præf. Robert' in forma prædict' dimissorum contigue adjacent' cuidam bosco voc' *Hanes Coppice*, tres quercus precii cujuslib' earum decem solidorum, ac unum fagum precii decem solidorum, ac in quadam alia sepe prædict' clausi voc' *Home Field* in Whitchurch præd', scil. parcell' tenementorum prædict' cum pertin' præf. Rob. in forma præd' dimissorum contigue adjacent' prædict' bosco voc' *Home Coppice*, decem quercus, precii cujuslib' ear' viginti solid'; ac etiam in permittendo germina de stipitibus viginti mill' aliarum querculorum voc' *Dkesapling*, viginti millium fagorum, & ducentarum fraxinor' ad valentiam viginti librar' in præd' bosco voc' *Highgrove*, ac decem mill' aliar' quercular' voc' *Dkesapling*, decem millium fagorum & centum fraxinorum ad valentiam viginti librar' in præd' bosco voc' *the Hedge Row*, & decem millium quercum, decem mill' fagorum & ducentarum fraxinorum ad valentiam viginti librar' in præd' Copicia voc' *Home Coppice*, per ipsam Eliz. per tot' content' illor' sepe alium bosc' & copiciz sparsim nuper crescent' succisar' per morsus & depast' animalium penitus devastat' & destruet' fore ad exhæreditationem ipsius Richardi, & contra formam provisionis præd', unde dic' quod deterioratus est, & damn' habet ad valentiam 200 l. & inde produc' sect' &c. Et prædict' Eliz. per Radulphum Burges attornat' suum, venit' & defend' vim & injuriam quando, &c. Et quicquid &c. attor-

Et dic' qd' prædict' Richard' actionem suam prædictam versus eam habere non debet, quia dic' quod bene & verum est quod prædictus Willielmus Hawe fuit feifit' de tenement' præd' cum pertin' in dominico suo ut de feodo, & sic inde feifit' existen' prædicto quarto die Januarii anno regni dict' dominæ Reginæ nunc vicesimo nono supradicto, per Indentur' suam præd' dimisit præf. Roberto tenemen' prædict' cum pertinentiis, (except' præexcept') habend' & occupand' sibi & assignatis suis a prædict' festo Natalis Domini tunc ultimo præterit', usq; finem & terminum præd' sexdecem annor' extunc prox' sequent' & plenar' complend', virtute cujus dimissionis idem Robertus in tenemen' præd' cum pertinen' superius in forma præd' dimissa intravit & fuit inde possession', & sic inde possessionatus existens præd' vicesimo die Augusti anno regni dict' dom' Reginæ nunc vicesimo nono suprad', concessit totum statum interesse & terminum ann' sua quæ ipse tunc habuit ventur' de & in præd' tenemen' cum pertin' superius dimissis præf. Eliz. Hynde, virtute cujus concession' prædict' Eliz. in eadem tenemen' cum pertinen' superius dimiss. intravit, & fuit inde possession' prout præd' Rich' per narrationem suam præd' superius suppon': Sed ead' Eliz. ulterius dic' quod eadem Eliz. de tenemen' præd' cum pertinen' superius dimissis in forma præd' possessionat' existen' ac præd' W. Hawe de reversione inde in dominico suo ut de feodo feifit' existen', post præd' septim' diem Martii anno tricesimo suprad' & antequam præd' Indentura barganiæ & venditionis inter præd' Willihelm' ex una parte, & præf. Rich' ex alter' parte fact' in cur' dict' dom' Reginæ de banco hic in forma præd' irrotulat' fuit, quidam finis levavit in curia ejusdem dom' Reg' de banco hic, scil. apud Westm' præd' a die Pasch' in 15 dies anno regni sui tricesimo suprad' coram *Edmundo Anderson, Francisco Windham, Willihelmo Periam, & Francisco Rhodes*, tunc Justic' ipsius dom' Reg' de banco & aliis dict' dom' Reg' fidelibus tunc ibi præsentibus, inter præd' Richardum per nomen Richardi Libbe generosi queren', & prædict' Willihelimum Hawe & Elenam uxorem ejus deforc' de tenementis prædictis cum pertinentiis superius in forma prædict' dimiss. inter alia per nomina unius messuagii, unius cotagii, duorum gardinorum, septuaginta acrarum terr', unius acr' prati, decem acrarum pasturæ, sexaginta acrarum bosci, & decem acrar' jampnorum & brueræ cum pertinen' in Goring & Whitchurch præd', & in Maple Deram in com' præd', unde placit' conventionis summonit' fuit inter eos in ead' cur', scil. qd' præd' W. & El. recog' præd' tenem' cum pert' esse jus ipsius Ri. ut ill' quæ idem Ri. habuisset de dono præd' Will' & Elena, Et ill' remiserunt & quiet' clam' de ipsis Will' & Elena, & hæred' suis, prædict' Richard' & hæredibus suis imperpet': Et præterea idem Willihel' & Elena concesserunt pro se & hæred' ipsius

W. qd' ipsi warrant' præd' Ri. & hæred' suis præd' tenem' cum pertin' cont' omnes hom' imperpet', prout per finem illum hic incur' de Recordo residen' plen' liquet, qui quid' finis in forma præd' levat', habit' & levat' fuit ad usum præd' Rich. & hæred' suor' post quem quid' finem sicut præfert' levat' s. 25 die April an' regn' dict' dom' Reg' nunc 30 suprad' præd' indent' præf' Ri. ut præfert' facta coram præfat' Justic' dict' dom' reg' de Banco hic irrotulat' fuit: Et eadem El. ulterius dic' quod ipsa ad concession' reversionis tenementor' præd' cum pertin' superius ut præfert' dimissorum virtute finis præd' præf. Rich. non attornavit sive agreavit; Et hoc paratus est verificare, unde petit judic' si præd' Rich' actionem suam præd' versus eam habere debeat, &c. Et præd' Ri. dic' qd' placit' prædict' Eliz. superius in barram placitat', ac materia in ead' content' minus sufficien' in lege existunt ad ipsum Ri. ab actione sua præd' versus præd' El' habend' præcludend', quodque ipse ad placit' illud modo & forma prædict' placitat' necesse non habet nec per legem terræ tenetur respondere; & hoc parat' est verific', unde pro defectu sufficient' placiti in hac parte, idem Ric. petit judic' & damna sua occasione vasti præd' sibi adjudicari, &c. Et præd' Eliz. ex quo ipsa sufficient' materiam in barr' actionis præd' superius allegavit quam ipsa parat' est verific', quam quidem mater' præd' Ri. non dedit, nec ad eam aliqualit' respond' sed verificationem illam admittit' omnino recusat, petit judic' & quod præd' Ri. ab actione sua præd' versus eam habend' præcludatur &c. Et quia Justic' hic se advisare volunt de & super præmissis priusquam judicium inde reddant, dies dar' est partibus præd' hic usque a die Paschæ in 15 dies de audiendo inde judicio suo, eo qd' iidem Justic' hic inde nondum &c.

Trin. 33 ELIZABETHÆ Regina.
In Communi Banco.

HYNDE'S Case.

1 And. 285, 286.

Richard Libbe, Esq; brought an Action of Wast against Elizabeth Hynde, and declar'd, That William Hawe was seised of an House called Place, and certain Lands in Goring and Whitchurch in the County of Oxford: And 4 die Julii, anno 29 Eliz. by his Deed indented demised the Tenements aforesaid to Robert Garrard from the Feast of Christmas then past for 16 Years, who 24 Augusti, the said 29 Year assign'd his Interest to the Defendant: And that the said William Hawe (a) 7 Maii, anno 20 Reg' Eliz. by Deed indented and inroll'd in the Court of C. B. Termino Pasche, in the said 30 Year (within six Months according to the Form of the Statute) for the Consideration of 120 l. bargain'd and sold the said Reversion to the said Libbe now Plaintiff in Fee, and assign'd the Wast in digging of Clay, &c. The Defendant confess'd that William Hawe was seised of the said Land, and that he by the said Indenture demised to Robert Garrard, and that he assign'd to the said Elizabeth, prout, &c. But the further said, that after the said 7 Day of May, in the said 30 Year, and before the said Indenture of Bargain and Sale was enrolled, the said William Hawe 15 Pasche in the said 30 Year levy'd a Fine of the Tenements aforesaid to the said Richard Libbe now Plaintiff, come ceo, &c. which Fine was to the Use of the said Plaintiff and his Heirs, after which Fine levied, scil. 29 Aprilis in the said 30 Year, the said Deed indented was enrolled in the said Court of C. B. And further the Def. said, that she never attorn'd; and upon this Plea the Plaintiff demurr'd in Law, and in this Case two Points were moved. 1. If the Conusee of the Fine after the said Indenture enroll'd should be said in by the (b) Fine, or by the Bargain and Sale, for if he should be adjudg'd in by the Fine, no Action of Wast would lie for Want of Attornment; And if he should be in by the Indenture enrolled, then there needed no (c) Attornment. And it was unanimously resolv'd by Sir Edm. Anderson and his Companions, Justices of the

(2) Godb. 432.

Common

(b) Cr. El. 285,
217. 6 Co. 68. 2.
Co. Lit. 320. 2.
1 And. 286.
F. N. B. 60. I.
(c) 1 And. 286.
Co. Lit. 309. b.
321. b. 2 Co. 36. 2.
5 Co. 113. b.
5 Co. 94. 2.
2 Inst. 672.

Common Pleas, That when *Hawe* by Deed indented bargain'd and sold the Reversion to *Libbe* and his Heirs, and before the Inrollment levied a Fine to *Libbe* and his Heirs, and afterwards the Deed is inrolled within the six Months, that the Conufee should be (a) in by the Fine, and not by the Indenture inrolled; for when the Fee simple passed by the Fine to the Conufee and his Heirs, the Inrollment of the Deed indented afterwards could not devert and turn the Estate out of himself, which was absolutely settled in him by the Fine; for then where he was in before in the *Per*, he would be now in the *Post*. Also when the Common Law and Statute Law concurr, the Common Law shall be (b) preferred: And it is true that the Inrolment shall have Relation to the Delivery of the Deed, but that is to (c) avoid mean Estates or Charges made to a Stranger by the Bargainor after the Delivery of the Deed, and before the Inrolment, but not to devert any Estate lawfully settl'd in the *interim* in the Bargainee himself. And the Statute of 27 H. 8. c. 16. of *Inrolments*, speaks by Bargain and Sale only, and here it is not by Bargain and Sale only, but the Estate is passed originally by the Fine. The other Point was, whether the Def. should be in this Case admitted to aver when the Deed was inroll'd, *f.* such a Day after the Fine levied, and before the Inrolment; and it was objected, 1. That in the Case at Bar it should be intended in Law, That the Deed was inroll'd the first Day of the said *Easter* Term, for the Term as to divers Purposes is but one (d) Day in Law, and *eo potius*, because it doth not appear by the Record what Day of the Term the Deed was enrolled, but generally *Term' Pasch'*, and therefore it should be intended to be inroll'd the first Day of the Term. 2. It was objected, That Records (for the avoiding of Infiniteness, which the Law abhors) are so high and sacred that they import in themselves inviolable Truth, which if any dare deny, the Law attributes so great Honour and Credit to them that they shall be (e) try'd only by themselves, and not by the Country: But if this Averment should be suffer'd, then the Effect and Validity of the Record would be try'd by the Country, which would be against the Rule of Law. 3. It was objected, That it would be mischievous to allow of such nice Averments, and trench to the Disenherison of many to draw in question the Time of all Inrolments of Bargains and Sales; for if the Beginning of the Term was within the 6 Months, and the End thereof after the 6 Months, by such Averment after long Possession when Witnesses are dead, the Estate of the Land might be drawn in Quest. which would be a perilous and dangerous Prejudice, and especially in these Days in which Subornation of Perjury abounds: But it was resolved *per tot' Curiam*, that the (f) Averment was good and lawful. And as to the 1 Objection it was answer'd and resolved by the Court, That it is true that it should be intended by Presumption in Law, that

(a) Mo. 337, 338;

Hob. 222.

1 Bulstr. 163.

2 Bulstr. 671, 672.

Cr. El. 917.

Cr. Car. 218.

Poph. 49.

1 Brownl. 142.

1 And. 27, 113.

2 And. 161.

Yelv. 124.

Owen 70.

10 Co. 96. 2.

Mo. 689, 681.

(b) 2 Inst. 672.

4 Inst. 140.

1 Leon. 6.

2 Co. 35. b.

1 And. 191.

Co. Lit. 49. 2.

(c) Hob. 222.

2 Bulstr. 34.

Cr. Car. 218.

Owen 70.

(d) Godb. 433.

5 Co. 74. b.

(e) Co. 25. 2. 31. 2.

2 Rol. 574. Co.

Lit. 260. 2. 117. b.

(f) 1 And. 256.

Cr. 126. 451.

(a) 2 Co. 48. a. the Deed was enrolled the 1st Day of the Term: But (a) *Stabit præsumptio donec probetur in contrarium*. And because the Plaintiff has by his (b) Demurrer confess'd the Inrolment to be after the Fine, for this Cause the Presumption vanishes and becomes of no Force, and the mutual Consent and Confession of both Parties shall stand. As to the second Objection it was answer'd and resolv'd by the Court, That it is true that (c) Records import in themselves Truth, and conclude all Men from denying any thing appearing within the Record, as antedate, &c. *Vide 37 H. 6. 21. b. Plow. Com. 7 & 8 Eliz. Dyer 242.* But to take (d) Averment which stands with the Record, and which doth not impugn any thing apparent within the Record, the Law doth well admit and allow: As against a Fine (e) upon Release, to say that the Conufee had nothing at the Time of the Fine levied, as it is held in 16 H. 7. 5. b. So against the King's Letters Patents under the Great Seal shewed in Court, none can deny them, but *Non (f) concessit per præd' literas patentes*, is a good Plea, for altho' there be such Letters Patents, yet perhaps nothing pass'd by them, and so *per consequens non concessit*. And altho' (g) Inrolment, or other Matter of Record shall not be try'd *per Pais*, yet the Time when the Inrolment was made shall be try'd *per Pais*, for the Inrolment itself shall never be drawn in Question (for that is agreed by both Parties) but only the Time of it, as in the other Case, where one pleads a Grant of the King by his Letters Patents under the Great Seal, and the other pleads *non concessit* by the same Letters Patents, in that Case the Letters Patents are confessed, but the Effect and Operation of them is denied, and therefore the Tryal shall not be where the Letters Patents bear Date, but where the Lands (h) lie, as it was adjudg'd. So if (i) Profession is deny'd, it shall be try'd by the Spiritual Court, but if the Time of the Profession is in Issue, it shall be try'd by Jury, as it is held in 9 H. 7. 2. As to the third Objection it was answer'd and resolv'd *per totam Curiam*, that if such Averment should not be admitted, great Injustice would be protected, and great Inconvenience ensue on the other Side; for suppose (as has been said) that the Beginning of the Term is only within the six Months, and in Truth the Inrolment was towards the End out of the six Months, if such Averment should not be receiv'd, the Bargainor would be disinher. against Truth and Justice, and no Inconven. can rise on the other Side, for, for the Presump. of the Law (as has been said) he who strives to avoid the Bargain, (k) ought to make nifest Truth thereof, for *actori incumbit onus probandi*: And as

to Fear of Perjury, (*a*) *Nullum iniquum est in jure presumen-* (*a*) Hard. 64.
dum; and these Days are not to be tainted with such Infamy
of Abundance of Perjury, as has been surmised; and com-
monly those who have most corrupt Consciences, are often-
times most suspicious, and complain most of the Iniquity of
the Times. 3. It was said by some of the Justices, That if
it be admitted that the Inrolment should be presum'd to be
made in *Quindena Pascha*, and that at the same Time the Fine
was also levy'd, that then the Bargainee should have (*b*) E-
lection to have the Reversion by the one, or by the other:
But in Respect of the former Resolutions, this Point was not
resolv'd by the Court.

(*b*) Mod. Rep. 176
1 Brownl. 142.
Yelv. 123, 124.
2 Co. 35. b. 37. b.
2 Rol. 787. Hob.
159. 1 Jones 206.
Poph. 95.
2 And. 203.

Paschæ

Paschæ 38 Regiæ ELIZ.

In the King's Bench.

BOROUGHES's Case.

Gould. 124.
Cr. El. 462.
Moor 404.

Between *Boroughes* and *Taylor* the Case was; Queen *Elizabeth* made a Lease for Years rendring Rent payable at the Receipt of her Exchequer at *Westminster*, seu *ad manus Ballivorum seu Receptorum*, &c. with the usual Condition to be void for Nonpayment of the Rent; And afterwards the Queen granted over the Reversion to another and his Heirs, and whether the Patentee should demand the Rent to take Advantage of the Condition was the Question upon a special Verdict. And it was mov'd, that the Demand ought to be made at the Receipt of the Excheq. for that is the certain Place appointed in the Lease, and principally because *Westm.* is added, and therefore of Necessity it ought to be demanded there and not upon the Land; and altho' the Reversion is granted over, yet that does not alter the Place where the Rent shall be paid; As if a common Person makes a Lease of his Manor of *D.* rendring Rent to be paid at his Manor of *Sale*, with Condition for Nonpayment, and afterwards he grants over the Reversion of the Manor of *D.* yet the Grantee ought to demand his Rent at the Manor of *S.* And altho' it is further said, seu *ad manus Ballivorum seu Receptorum*, &c. yet forasmuch as it is for the Benefit of the Lessee, and he has Election either to pay it at a certain Place, or to the Bayliff or Receiver of the Lessor, and forasmuch as the said Words are Words of Abundance, for the (a) Law implies them, altho' they were omitted, and because the Condition is here penal to the Lessee that he shall lose his Interest, for these Reasons the Law requires that the Patentee ought to make Demand upon the Land, and not elsewhere. And therefore if a common Person makes a Lease for Years of the Manor of *D.* rendring Rent at his Manor of *Sale*, with Condition of Re-entry, if the Rent be not paid at the Place aforsaid,

(a) Co.Lit. 201.b.
Hard. 306.

aforesaid, or to the Hands of the Lessor himself, in that Case for the Reasons aforesaid, the Demand ought to be made at the Manor of *Sale*, and chiefly because the said Words are abundant, and no more than the Law without them would have implied, wherefore it was strongly urged and concluded, that in the Case at Bar the Demand ought to be made at *Westminster*, at the Place where the Receipt of the Queen's Exchequer is kept: But it was adjudged by *Popham, C. J. Clench, Gawdy and Fenner* Justices, That in the said Case the Demand ought to be made upon the (a) Land; And in this Case divers Points were resolved by the Court. 1. That if in Case of a common Person the Rent reserved upon the Demise be payable at a (b) Place out of the Land, that he who will take Advantage of a Condition for Non-payment of such Rent, ought to demand the Rent at the Place where it is appointed to be paid; for the Limitation of the Payment of the Rent out of the Land, doth not alter the Nature or Quality of the Rent, nor of any Thing incident to it, but it is to all Intents a Rent issuing out of the Land, and not a Sum in gross, for it shall pass with the Reversion as incident to it, and shall be suspended by Entry of the Lessor into any Part of the Land leased, and shall be apportioned by Recovery of Part in Waste, or Entry into Part for Forfeiture, &c. and shall have all other Qualities of a Rent in the same Manner as if it had been payable upon the Land; And therefore the Opinion in *Kidwelly's Case* in *Plow. Com.* 70. that he in the Reversion may enter for non Payment of such Rent without any (c) Demand made, was utterly denied by the whole Court in this Case; And the Justices said, that it had oftentimes been adjudged to the cont. 2. When the Q. makes a Lease for Years rendring Rent with Condition *ut supra*, the Q. shall take Advantage of the Condition (d) without any Demand; But when she grants the Reversion over, her Grantee shall not take Advantage of the Condition (e) without Demand; for the Reason that the Q. shall take Advantage of the Condition without Demand was not in Respect of the Nature or Quality of the Rent, or that the Law adjudges that such Rent reserved to the Q. was not *omnino* demandable, but that the Lessee in such Case ought to do the first Act, *s.* either to pay or tender the Rent; for it was resolved by the Court, that as long as the Reversion and Rent continue in the Q. the Law dispences with the Demand as a Thing undecent and against the Dignity of the Q. to attend upon her Subject to make a Demand of him; But the Law (which always requires that *Decorum* and Conveniency be observ'd) appoints the Subject to attend upon his Sovereign, and in such Case to do the first Act, altho' it be in Case of a Condition, which trenches to the Destruction of his Estate, but this is but a personal Prerogative annexed to the Person of the K. and not in Respect of the Nature or Quality of the Rent; and therefore

(a) Goldsb. 124.
 Hard. 306. Cro.
 El. 167, 415,
 462. Co. Lit.
 201. b. 210. b.
 (b) Co. Lit.
 153. a. 202. a.
 1 Roll. 459.
 2 Roll. 428.
 Cro. Car. 508.
 2 Jones 33.

(c) Dyer 68. pl.
 23, 24, 329. pl.
 12. Moor 598.

(d) Larch. 28.
 Moor 210, 296.
 5 Co. 56. a. b.
 (e) Co. Lit. 201. b.

BOROUGH'S Case. PART IV.

if he grants the Reversion over, the Grantee shall not take Advantage of the Condition without Demand made of the Rent. The 3 Point (the great Doubt of the Case) which was resolved, was, that in this Case the Patentee ought to (a) demand the Rent upon the Land; and their principal Reason was grounded upon a Rule in Law, *s.* That the Expression of a Clause which the Law implies, works nothing, (b) *Expressio eorum quae tacite insunt nihil operatur & expressa non profunt, quae non expressa proderunt*: And yet as (c) *Litleton* saith, it is well done to put in such Clauses to declare and expresse to Lay-men which have no Knowledge of the Law, what the Law requires in such Cases: As in 30 *Ass.* 8. a Lease is made to two for Term of their Lives, (this Clause being added and expresse, & *diutius* (d) *eorum viventi*) and afterwards they made Partition, and one died, and he in the Reversion entred, and his Entry adjudged lawful notwithstanding the said Words, & *diutius eorum viventi*, for without them so much was *tacite* implied by the Law. *Vide* 17 *E.* 3. 7. *John Hull's Case.* 27 *H.* 8. *tit. Office Br.* 17. in Case of an Act of Parliament, 2 *H.* 7. 9. in Case of a *Liberate*, *Plow. Com.* 486 & 545. And it was resolv'd, that if the King makes a Lease for Years rendring Rent, without appointing any Place, or to whose Hands it shall be paid, the Lessee may by Law pay it either at the Receipt of the Exchequer, or to the Hands of the King's Bailiffs or Receivers which the King has authorized to such Purpose. And therefore the special and usual Limitation of Payment of Rent in such Cases at the Receipt of the (e) Exchequer, or to the Hands of the King's Bailiffs or Receivers, &c. imports no more than the Law without it would have (f) implied, and therefore *nihil operatur* thereby; and although the said Clause is *ad receptum Scaccarii, &c. apud Westm'*, yet it being affirmative and declaratory, it is not necessary that the Receipt be held at *Westm'* for if the Receipt of the Exchequer be held at another (g) Place, the Rent is to be paid there; for as to this Point the Law would have implied that which is expresse. *s.* at *Westm.* and more, *s.* at whatsoever other Place the Receipt be kept: Then in the principal Case, if the Rent had been reserved generally, the Patentee ought to have demanded it upon the Land, & *per consequens* so ought it to be done in the Case at Bar. And it was said, as the Law has appointed the Receipt of the Exchequer to be the Place where the King's Revenues shall be received, so in the Case of a common Person, the Law has appointed a Place where his Rent (if no other Place by mutual Agreement of the Parties be appointed) shall be paid, and that is, upon the Land demised, and there he ought to make a Demand of it.

(1) Co. Lit. 201. b.

(b) 5 Co. 11. a.
8 Co. 56. b.
145. a. 10 Co.
39. a. 11 Co.
60. a. 1 Roll.
Rep. 310. 2 Roll.
Rep. 393. Latch.
25. Palm. 433.
437. Wing.
Max. 235. Co.
Lit. 191. a.
205. a. Lit.
Rep. 111.
2 Inst. 365.
2 Sand. 351.
1 Bulfr. 131.
1 Mod. Rep. 190.
Hard. 92. Hob.
170.
(c) Lit. Sect.
334. Co. Lit.
204. b. 1 Jones
135.
(d) 2 Roll. Rep.
393. Co. Lit.
191. a. 2 Roll.
150.

(e) Goldsb. 124.
Cro. El. 462.
Co. Lit. 201. b.
(f) Co. Lit.
201. b. Hard.
306.

(g) Cro. El. 462.

*Hill. 39 Regina ELIZABETHÆ,
In the King's Bench.*

PALMER'S Case.

Between *Palmer* Plaintiff, and *Umpfrey* Defendant, in the King's Bench, it was resolved *per totam Curiam*, that if a *Fieri facias* comes to the Sheriff to levy the Money of the Goods and Chattels of the Defendant, and the Sheriff by writing reciting that the Defendant has a Term for Years (and shews what) and supposing that it began 2 & 3 *Phil. & Mar.* (as it was in the Case at Bar) where in Truth the Term began 3 & 4 *Phil. & Mar.* sells the same Term, the Sale is void, for there is no such (a) Term; But notwithstanding this false Recital, if the Sheriff sells also all the Interest which the Defendant has in the said Land (as also in the Case at Bar he did) this Sale is good. And *Popham* Chief Justice said, in this very Court anno 26 *El.* between Sir *George (b) Sydnam* and *Rolles*, the Case was such; The Sheriff in the like Case reciting that *Rolles* had a Term of a Parsonage *pro termino diversorum annorum ad tunc ventur'*, sold it by Force of a *Fieri facias* to another, and it was adjudged good enough. For by common Intendment the Sheriff can't have precise Knowledge of the Certainty of the Beginning, and the Certainty of the End of the Term; But if he takes upon him to recite the Term and (c) misrecites it and sells the same Term, it is void; but if he sells all the (d) Interest that the Defendant has in the Land, it is good enough notwithstanding the Misrecital as is aforesaid. And so observe the Difference between the Sale of a Term, and an Extent of a Term, for accordingly it was adjudged *M. 32 & 33 Eliz. in Scaccario*, that where it was found by Inquisition that the Queen's Debtor was possessed of certain Lands *pro Termino quorundam annorum ad tunc ventur'* that this Inquisition was insufficient, for a Term cannot be extended without

*Goldsb. 172.
173. Cro. El.
584. Styl. 62.
Owen 18. Moor
702. pl. 976.*

(a) *Cro. Car.
399.*

(b) *Goldsb. 172.
Cro. El.
584.*

(c) *Godb. 433.
Carr. 155.*

(d) *Goldsb. 173.
Cro. El. 584.*

(e) 2 *Leon.
121. 3 Leon. 204.
Lane 50. 51.*

shewing the Beginning and Certainty of the Term, and the Reason is this, because after the Debt satisfied, the Party is to have his Term again, if any Part of it remains, which ought to appear, and thereupon the Party may have Remedy to remove the Hands of the Queen or other Person: But in the Case of a Sale upon the *Fieri facias*, the Sheriff may sell all the Interest or Term which the Defendant has in such Land, and never mention it in his Return, but generally, *quod fieri fecit de bonis & catallis, &c.* But if the Execution in the principal Case should be levied, it would tend to the Ruin of a poor Man who made great Complaint to the Court; the Attorney-General coming in to the Court at the Request of the poor Man perused the Record, and thereby found that the Execution was by Force of an *Elegit*, which ought to be made by Inquisition, for the Statute of *Westm. 2. cap. 18.* which gives the *Elegit*, provides, *Quod Vicecom' liberet ei omnia catalla, &c. & medietatem terre sua, quousque debitum fuerit levatum per rationabile pretium* (which refers to Chattels) *& extentum*, which refers to Land, and *rationabile pretium*, and Extent ought to be found by (a) Inquisition and Verdict, for that is implied in Law, and the Court as the Law appoints, altho' it be not so expressed, *vide 10 E. 4. 11. 7 R. 2. Burr 241.* (b) Proof is intended Trial by Verdict, and the Words of the Writ of *Elegit* are according to the said Statute, and therewith agrees 2 *Mar.* (c) *Dyer 100.* that the Extent and Apprifement ought to be *per sacramentum duodecim*, and not by the Sheriff, and many Precedents: And because the Term was mistaken in the Inquisition, and the Term so mistaken was apprifed by it; and the Sheriff could not sell any Term but that only which was apprifed by the Jurors of the Inquisition, he therefore moved the Court, that the said Sale was utterly void, and so was the Opinion of the whole Court; And Judgment given accordingly.

(a) Cro. El. 584.
Cro. Jac. 569.
Antea 67. a.
2 Inst. 396. Dyer
100. pl. 71.
2 Bulstr. 97.
Dall. 28. pl. 1.
Goldsb. 173.
(b) Hob. 93. 217.
2 Co. 108. a.
11 Co. 39. a.
Cro. Jac. 188.
232. 381. 3 Bulstr.
55. 2 Brownl.
57. 1 Rol. Rep.
222. 261. 2 Rol.
595. 1 Sid. 313.
Moor 113. pl.
253. 181. pl.
322. 845. pl.
1140. 888. pl.
1250. Perk.
Sect. 791. 3 Inst. 98. Br. Condition 151. (c) Goldsb. 173. Cro. El. 584, 735. Dyer 100. pl. 71.
2 Inst. 396. 2 Bul. 97.

*Trin. 39 Regina ELIZABETHÆ,
In the King's Bench.*

HOLLAND'S Case.

William Armiger was Plaintiff in a Prohibition against William Holland Parson of Northcreak in the County of Norfolk, and declared, That Matthew Bishop of Canterbury collated by Laps John Meye to the said Church of Northcreak, who was therein inducted, and further had the Moiety of the Church of Darsfield in the County of York, and afterwards 17 Augusti anno 19 Eliz. he was nominated and elected to be Bishop of Carlisle; after which Election, and before Consecration and Installation into the said Bishoprick, scil. 18 Augusti anno 19 Eliz. the Queen by her Letters Patents, *De gratia sua speciali, ac ex certa scientia, & mero motu suis concessit, & licentiam & potestatem dedit prefat' J. Meye, quod ipse in ipsam Ecclesiam Cathedralis Carl' consecrat' procurat' & obtineret; Necnon realem, actualem & corporalem possessionem, &c. recipere & obtinere, & nihilominus pred' medietat' dictæ Rector' de Darsfield, ac Rectoriam de Northcreak, una cum dicto Episc' quamdiu eidem Episcopat' præset, retinere & possid', ac fructus & emolumenta inde quamdiu eidem Episc' præset in suos proprios usus convertere, &c.* And afterwards 20 Sept' anno 19 Eliz. the said John Meye was consecrated and installed into the said Bishoprick, and was and yet is Bishop of the same See; And the Pl. claimed a Lease for Years in the said Rectory of Northcreak by Force of a Demise made by Indenture by the said Bishop 1 Maii anno 20 Eliz. for a Term of Years yet enduring; and that the Defendant being now lately presented by Laps by the Queen, pretending the said Letters Patents of the Queen made to the said Jo. Meye were void, sued for Tithes in the Spiritual Court, &c. And the Def. *pro Consultatione habenda* said, That the said Church of Northcreak at the Time of the Induction of the said J. Meye was and yet is *Benefic' cum cura animarum, & ultra annum valorem 8 l. viz. 8 l. 10 s.* And afterwards the said J. Meye (a) accepted the Moiety of the said Church of Dars. and was instituted and inducted thereto, and the Pleading was,

2 Moor 542, 545.
Cro. El. 601.
Dav. 77, 78.
Hob. 156.
2 Brownl. 46.
2 Roll. Rep. 453.

(a) 1 Sid. 169

HOLLAND'S Case. PART IV.

(a) Co. Lit. 17. b. 10 Co. 136.

(b) Dav. 69. a. Postea 78. b. 89. b. 2 Brownl. 45.

(c) Moor 542. Cro. El. 601. Cro. Car. 357. 476. Heil. 125. Lit. Rep. 239. Co. Lit. 129. a. 2 Rol. 352. Dr. & Stud. Lib. 2. cap. 31. F. N. B. 34. L. 1 Jones 404. 2 Brownl. 45. 46. Vaugh. 21. Hob. 166. (d) F. N. B. 35. H. Postea 79. b. 6 Co. 39. b. Goldsb. 141.

(e) Postea 79. c.

(f) Cawly 23. 6 Co. 29. b. Cro. Car. 357. Dyer

ad (a) medietat' Rectoria, where it should be *ad Rector' medietatis*, &c. (but the Court took it to be all one in Effect) and that the said Church of *D. fuit Beneficium cum cura animarum*, and confessed the said Letters Patents *prout*; and concluded that *pretextu pramissorum*, the Church of *Northcreek* became void, and Title to present by Laps devolv'd to the Queen, who presented the Def. to it 15 Feb. 1592, and made no Mention of the Act of (b) 21 H. 8. cap. 13. in his Plea; and upon this Plea the Pl. demurr'd in Law. And in this Case two Points were resolved. 1. That before the Statute of 21 H. 8. cap. 13. if one had a Benefice with Cure, and accepted another Benefice with Cure, that the first Benefice was (c) void, but it was not an Avoidance by the Common Law, but by the Constitution of the Pope, of which Avoidance the Patron might take Notice if he would, and might present if he would without any Deprivation; but because the Avoidance accrued by the Ecclesiastical Law, no Laps incur'd without (d) Notice, as upon Deprivation or Resignation, and yet the Patron might present, and take upon him Notice if he would; so that for the Benefit of the Patron the Church is void in the principal Case, but not for his Disadvantage: And according to this Difference it is adjudged in *Hill. 24 E. 3. 33.* that in a *Quare impedit* brought by the King against the Bishop of *Worcester*, it was a good Title for the King that the Predecessor of the Bishop presented to the same Church one *A.* who afterwards accepted another Benefice, by which Acceptance the Church in Question was void, and remained void till the Temporalities of the Bishop came to the King's Hands, and so it belonged to him, &c. And the King upon this Title by Award of the Court had a Writ to the Bishop, which proves that Ch. was void in Fact without any Deprivation, to which the K. might by Law present his Clerk; and there- with agree the Books in 9 (e) *E. 3. 22. a. 10 E. 3. 1. 14 H. 7. 28. b. 14 H. 8. 17. a. F. N. B. 34. l. Et dictum est in 10 E. 3. 1.* that in such Cases both Churches shall be void, and by *Parning* the Constitution of Plurality is a general Judgment, that all shall be deprived who hold many Benefices with Cure above one Month after the Constitution, which binds stronger against them upon their Privation than particular Judgment of a certain Person, for a particular Deprivation may be avoided by Appeal, and the other not. But some Opinions are in 5 *E. 3. 9. & 11 H. 4. 37.* that the Church is not void without Deprivation; but that may be understood for the Disadvantage of the Patron, but for his Advantage it is void as is aforesaid, and so all the Books are well reconciled, so that the Statute of 21 H. 8. is in this Point but a Confirmation and Assurance of the Law before: But now for as much as it is affirmed by Act of Parliament, if the first Benefice be of the Value of 8 *l.* *per Ann.* the Patron at his (f) Peril ought to present to it,

for in as much as to an Avoidance by Parliament every one is Party, every one ought to take Notice of it at his Peril, but otherwise if the first Church be not of the yearly Value of 8 l. for then it is void meerly by the Ecclesiastical Law, whereof the Patron need not take Notice at his Peril as is afore-said. 2. It was resolved *per tot. Cur.* that the said Act of (a) 21 H. 8. was such a general Act that the Judges (although it be not set forth in Pleading by the Party) ought to take Notice of it *ex officio*. *Nota Reader*, the Rule of the Law is, That of general Statutes the Judges ought to take Notice, altho' they be not pleaded, otherwise of special or particular Statutes: And for the better Understanding of your Books in this Point, and which shall be said in Judgment of Law *Statutum generale*, and which is *Statutum speciale*, it is to be known, that *generale* (b) *dicitur a genere, & speciale a specie*; And there are *Genus, Species, & Individua*; Know that Spirituality is *Genus*, Bishoprick, Deanery, &c. are *Species*, and Bishoprick or Deanery of *Norwich*, *Individuum*, *sic dicit' quia in (c) partes dividi nequit*. And therefore it was resolved in the Case at Bar, that forasmuch as the Act of 21 H. 8. concerns the whole Spirituality in general, it was a general Act whereof the Judges ought to take Notice. And *Pasch.* 31 *Eliz. Rot.* 514. it was adjudged between *Claypool* (d) and *Carter* in (d) *Postea* 120 b. *C. B.* and affirmed by Writ of Error in *B. R. Hill.* 32 *Eliz. Rot.* 791. that the Act of 18 E. c. 6. concerning Colleges in the two Universities, and the Colleges of *Eaton* and *Winchester* was a particular Act whereof the Judges shall not take Notice. But the Statute of (e) 13 *Eliz. cap.* 10. and 18 E. cap. 11. concerning Colleges, Deans and Chapters, Hospitals, Parson, Vicar, or any other having any Spiritual or Ecclesiastical Living, are general Acts, whereof the Judges shall take Notice, which Case is like the Case at the Bar. But it was adjudged *Trin.* 30 *Eliz.* in *B. R.* between *Elmer* Bishop of *London* and *Gate*, for the Scite and Demesnes of the Manor of *Draiton* in the County of *Midd'*, that the Statute of (f) 2 *Rolls* 466. (f) 1 *Eliz.* concerning Leases, &c. made by Bishops was a special Act because it concerned the Bishops only, who are but *Species* of the Spirituality, and therefore of such special Law the Judges shall not take Conufance if it be not pleaded, and therewith agrees 13 E. 4. 8. b. & *sic de similibus*: So this Word (*Officer*) is a general Word or *Genus*, (*Sheriff*) is a special Word or *Species*; and *Sheriff* of *Norf.* is *Individuum*: And therof. the Stat. of *W. 1. c.* 26. (g) by which it is enacted, (g) *Doct. pl.* 3 that no *Sheriff*, nor other the *K's Officer*, take any Reward to do his Office,

HOLLAND'S Case. PART IV

Office, but shall be paid of that which they take of the King, is a general Act, because it extends to Officers *in genere* :

(a) Plowd. 65. a.

1 Sid. 23, 24.

356. Doct. pl.

337. Hob. 13.

Moor 468.

2 Sand 154. 155.

3 Co. 59. b.

Cro. El. 460.

1 Ven. 85.

(b) Doct. pl. 337.

Dyer 27. pl. 179.

(c) Doct. pla.

337.

(d) Doct. pl.

338.

(e) 5 Co. 5. b.

Br. Parliam. 61.

(f) 5 Co. 5. b.

Br. Parl. 35.

(g) Doct. pla.

338.

(h) Doct. pl. 338.

(i) Doct. pla. 338.

(k) Doct. pla.

338.

(l) Doct. pla. 338.

But the Statute of (a) 23 H. 6. cap. 10. which extends only to Sheriffs, is but a particular and special Act, as it is held 3 Ma. Dyer 119. a. So Mystery or Trade is a general Word, Trade of Groceries is special, and this Grocer by Name is *Individuum* : And therefore Acts of Parliament concerning Mysteries or Trades are general Acts ; But an Act of Parliament concerning the Trade of (b) Groceries is a special Act, as it is said 28 H. 8. Dyer 27. because the Trade of Grocers contains under it but *Individua*, or singular Persons, as this or that Grocer by Name, vide 10 E. 4. 7. a. The Statute of *Marlebridge cap. 3. Non (c) ideo puniatur Dominus per redemptionem*, is a general Law for the Reasons aforesaid, for this Word *Seignior* is a general Word. But an Act concerning all the Nobility, (d) or Lords of the Parliament, or all the Bishops of *England*, or all Corporations made by King H. 6. are special and particular Acts for the Causes aforesaid, as it is held in the Case of the Lord Say in 13 E. 4. 8. b. *Know Reader*, if an Act is special which extends *ad species* ; *a multo fortiori*, it is special or particular which extends *ad individua* : Vide (e) 14 E. 4. 1. a. & 43 (f) Ass. 29. So observe what Act as to Persons is general, and what not. Now know, that altho' the Matter is special, so that under it there are but *individua*, yet if it is general as to Persons, thereof the Judges shall take Conusance : but if the Act concerns *aliquod singulare seu individuum*, altho' it is general as to Persons, yet the Judges shall not take Conusance thereof : As Appeal is a special Action, and contained under this general Word Writ ; and yet the Statute of *Magna Charta cap. 34.* which concerns (g) Appeals is general, and the Judges ought to take Notice thereof, as it is held in 10 E. 4. 7. a. But if an Act was made that no (h) Appeal shall be brought of the Death of *J. S.* this Act is particular, *Causa qua supra* : So the Act of *Magna Charta cap. 25. of Wast*, (i) *W. 2. cap. 25.* concerning Assises, & cap. 18. concerning Assise by Tenant by *Elegit*, cap. 41. concerning *contra formam collationis* ; 23 H. 8. of *Attaint & familia*, are general Laws altho' they concern special Actions ; the same Law 4 H. 7. cap. 17. and *Merton, cap. 6.* of (k) *Wards, &c. de ceteris* : But altho' the Act as to Persons is general, but the Matter thereof concerns *Individ*, or singular Things, as any (l) particular Manor, or House, &c. or all the Manors, Houses, &c. which are in one or sundry particular Towns, or in one or divers particular Counties, these are such particular Acts whereof the Judges shall not take Conusance,

if they be not pleaded or alledged by the Party; But of every Act (altho' the Matter thereof concerns *Individua*, or singular Things, yet) if they touch the King, the Judges *ex officio* ought to take Conufance, for every Subject has Interest in the King as in the Head of the Commonwealth; and as the inferiour Members can't efrange themselves from the Aétions and Paſſions of the Head, no leſs can any Subject efrange himſelf from any Thing which touches or concerns the King their ſupreme Head: *Vide Plow. Com.* in the Lord *Barkley's Case.* *Vide* for theſe Matters, 21 E. 4. 59. a. 37 H. 6. 15. & *Plow. Com.* in *Wimbiff's Case* 53. And *Tanfield*, *Godfrey*, and others were of Counſel with the Pl. and *Coke* and *Houghton* with the Defendant.

Mich.

Mich. 40 & 41 ELIZABETHÆ
Regina.

The Case of Corporations.

IN this Term at Serjeant's Inn in *Fleetstreet* it was demanded of the Chief Justices *Popham* and *Anderson*, *Perriam* Chief Baron, and the other Justices, That where divers Cities, Boroughs, and Towns are incorporated by Charters, some by the Name of Mayor and Comminalty, or Mayor and Burgeses, &c. or Bailiffs and Burgeses, &c. or Aldermen and Burgeses, &c. or Provoft, or Reve and Burgeses, or the like. And in the said Charters it is prescribed, That the Mayors, Bailiffs, Aldermen, Provofts, &c. shall be chosen by the Comminalty or Burgeses, &c. If the ancient and usual Elections of Mayors, Bailiffs, Provofts, &c. by certain selected Number of the Principal of the Comminalty, or Burgeses, commonly call'd the Common Counsel, or by such like Name, and not in general by the whole Comminalty or Burgeses, nor by so many of them as would come to the Election were good in Law, for as much as by the Words of Charters the Election shou'd be indefinitely by the Comminalty, or by the Burgeses, which is as much as to say by all the Comminalty or all the Burgeses, &c. Which Question being of great Importance and Consequence, was referred by the Lords of the Council to the Justices to know the Law in this Case, because divers Attempts were of late in divers Corporations contrary to the ancient Usage to make popular Elections. And it was resolved by the Justices upon great Deliberation and Conference had amongst themselves, That such ancient and usual Elections were good and well warranted by their Charters, and by the Law also; for in every of their Chart. they have

Day. 44. b.
Lane 21. Jenk.
Cent. 273.
3 Bulstr. 71.
Hob. 15.

have Power given them to make Laws, Ordinances, and Constitutions for the better Government and Order of their Cities or Boroughs, &c. by Force of which, and for avoiding of popular Confusion, they by their common Assent constitute and ordain, That the Mayor or Bayliffs or other principal Officers shall be elected by a selected Number of the principal of the Comminalty or of the Burgesses as is aforesaid, and prescribe also how such selected Number shall be chosen, and such Ordinance and Constitution was resolv'd to be good and allowable, and agreeable with the Law and their Charters for avoiding of popular Disorder and Confusion: And altho' now such Constitution or Ordinance can't be shew'd, yet it shall be presum'd and intended in Respect of such special Manner of ancient and continual Election (which special Election could not begin without common Consent) that at first such Ordinance or Constitution was made, such reverend Respect the Law attributes to ancient and continual Allowance and Usage, altho' it began within Time of Memory: *Mos retinendus est fidelissima vetustatis; que prater consuetudinem & morem majorum sunt, neque placent, neque recta videntur; & frequentia actus multum operatur.* And according to this Resolution the ancient and continual Usages have been in *London, Norwich*, and other ancient Cities and Corporations, and God forbid that they should be now innovated or altered, for many and great Inconveniencies will thereupon arise, all which the Law has well prevented, as appears by this Resolution.

Hill. 41 ELIZABETHÆ.

Reginæ. In the King's-Bench.

DYGBY's Case.

Co. Ent. 203. pl. 9.
Jenk. Cent. 273.
Mo. 434, 435, & c.
Goldb. 162, 163,
& c. Vaugh. 21.
2 Rolls Rep. 453.
Lit. Rep. 304.

Between *Richard Robins* Plaintiff in *Ejectione firma* for Par-
cel of the Glebe of the Rectory of *Horton in comitat'*
Lincoln, on a Demise made to him by *Edward Wickham*
Parson there, and *William Gerrard* and *John Prince* Defen-
dants; upon Not guilty pleaded, the Jurors gave a special
Verdict to this Effect; (which Action began in the King's
Bench Hill. 38 Eliz. Rot. 781.) The said Rectory of *Horton*
is a Benefice with Cure, and of the annual Value of 8*l.* &
amplius, to which (the Church being void) *George Digby*,
Esq; Patron thereof did present *Robert Merick* his Clerk, who
at his Presentment was admitted, instituted and inducted:
And afterwards Queen *Elizabeth anno regni sui 29*, presented
the said *Merick* to the Church of *Stanes* in the County of
Middlesex, which is a Benefice with Cure; to which Church
of *Stanes* the said *Merick* was admitted and instituted, and
before Induction *Catherine* the late Wife of the Lord *Bo-*
roughe admitted and receiv'd by Writing under her Seal the
said *Merick* to be her Domestick Chaplain according to the
Form of the Statute 21 H. 8. (a) And afterwards the Arch-
bishop of *Canterbury* by his Letters of Dispensation; *Cum*
eadem Rob. Merick, ut una cum Rectoria de Horton diocesi. Lin-
coln' quam ad tunc obtinuit, Ecclesiam de Stanes diocesi. Lond' re-
cipere, & quoad vixerit retinere libere & licite valeat, & possit,
authoritate Parliamenti gratiose dispensavit: And afterwards
the Q. by her Letters Patents under the Great Seal ratify'd and
confirm'd the said Letters of Dispensation: And afterwards
the said *R. M.* was inducted in the said Church of *Stanes, viz.*
30 Aug. anno 29 El. And afterwards the Q. by Laps anno 33,
presented

(a) Antea 75. b.
Postea 89. b. 117. a
21 H. 8. cap. 13.

presented the said *Ed. Wickman* to the Church of *Horton*, who was admitted, inducted, and inducted, and demised to the Pl. upon whom the Defts' as Servants of the said *Rob. Merick* enter'd and ejected him; and if they were guilty or not was the Question: And it was adjudg'd for the Pl. that the said (a) Dispensation came too late, because it came after the Institution, for by the Institution *Ecclesia plenz et consulta existit* against all Persons but against the K. And it is to be known, that every Rectory consists upon Spirituality and Temporality; and as to the Spirituality, *s. Cura animar'*, he is compleat Parson by the Institution; for when the Bishop upon Examination found, admits him able, then he institutes him, and says, *Instituo te ad tale beneficium & habere cur' animar'* of such a Parish, & (c) *accipe cur' tuam & meam, &c. Vide 33 H. 6. 13.* But as to the Temporalities, (d) as the Glebe Land, &c. he has no Freehold in that 'till Induction, *vide Hare & Buckley's Case. P. Com. 528.* And for the better understanding of our Books, know Reader, *Qd' per generale Concilium * Lateranense tentum sub Innocentio Papa tertio; Statut' est qd' quicumq; recipit aliquod benefic' habens cur' animar' annex', si prius tale benefic' obtinebat, eo sit jure ipso (e) privatus, & si forte illud retinere contenderit, alio etiam spoliatur; Is quoque ad quem prioris spectat donatio, illud post reception' alterius conferat cui merito viderit conferend'*, and this Council was held anno Dom' 1215. *vide Tom. 4. 221. c. 29. de Multa*: by which it appears that by the Acceptance of the (f) second Benefice, the first is void *ipso jure*, and the Patron may present if he will: And upon this general Council are the Books in (g) 9 E. 3. 22. a. 10 E. 3. 1. (where the said general Council is mention'd) 24 E. 3. 30. a. 11 H. 4. 37. 14 H. 7. 28. 14 H. 8. 17. F. N. B. 34. l. grounded. But now what shall be call'd an Acceptance of a second Benefice with Cure within the said Act of (h) 21 H. 8. is the Question; and the Doubt arises upon this, That altho' *Merick* by his Institution was Parson as to the Spirituality, *s.* to celebrate Divine Service and Sacraments, to preach and instruct his Parishioners in the true Faith, yet he is not compleat Parson, for he wants his Temporalities whereof he may live 'till Induction, and therefore he is not compleat Parson 'till Induction, and the Statute is to be intended of a compleat Parson. 2. It was objected, that altho' he shall be said compleat Parson before Induction, yet he has not a Benefice with Cure 'till he is inducted; for this Word (Benefice) as it was said, implies Profit and Benefit, which he cannot have 'till Induction; and he who has *Beneficium* ought to execute and *facere officium*, but none can do his Office without some Benefit. 3. It was objected, that the said Act of 21 H. 8. doth not make the first Benefice void 'till Induction, for the Words are, *and be instituted and inducted in the Possession*

(a) Jenk. Cent.
273. Dav. 78. 2.
Goldsb. 106.
Mo. 12 Larch. 32.
2 Rolls 259, 360.
Hob. 158.

(b) Co. Lit. 344. a.
2 Inst. 356.
(c) 1 Siderf. 427.
(d) 1 Inst. 356.

1 Palm. 349.

(e) 2 Rolls 360.
361.

(f) Cr. Car. 357.
Antea fol. 75. b.
2 Rolls 360, 361.
(g) Antea 75. b.

(h) 21 H. 8. c. 15.

of the same, &c. But it was resolv'd, that great Inconvenience would ensue, if the first Benefice should not be void by the Institution to the 2 Benefice, by Force of the said Constitution, for then one might be instituted to divers Benefices with Cure, the great Cure and Charge of which one could not discharge, and yet no other could be presented to any of them which would be inconvenient; and therefore *vide Tomo 5. General' Concilior' pag. 368. cap. 64. Res ipsa loquitur plura Beneficia possimum quibus animarum cur' submissa est, non sine gravi Ecclesiarum damno ab uno obtineri, cum unus in pluribus Ecclesiis rite officia persolvere, aut rebus earum necessariam curam impendere nequeat*; whereby it appears that the great Mischief before the said Council was, that those who had Plurality of Benefices, could not discharge their Pastoral Duties which belong'd to their Functions, which Functions they had to all Intents by the Institution before Induction: And in Judgment of our Law, he who is instituted to a Benefice has accepted it, for the Church is full by the Institution before any Induction.

2. It has been now lately adjudg'd in the Common Pleas, that where a Clerk was presented, (a) admitted and instituted to a Benefice with Cure above the Value of 8 l. and afterwards and before Induction to the first, he accepted another Benefice with Cure, and is inducted to it, that the first is void by the Statute of 21 H. 8. for the Words of the Act are, *If any Person (b) having one Benefice with Cure, &c. accept and take another, &c.* and he who is instituted to a Benefice, is said in Law to have accepted a Benefice, and to have a Benefice. And Popham C. J. said, That altho' by the Institution to 2 Benefice, the first is void by the Ecclesiastical Law without any Deprivation, or Sentence declaratory, yet no Laps shall incur against the Patron, unless (c) Notice be given him, no more than if the Church became void by Resignation or Privation, and yet the (d) Patron may take Notice if he will, and may present according to the said Constitution, but he is not forc'd to take Notice at his Peril, unless he is Inducted: *Quod fuit concess' per tot' Cur'*. And then forasmuch as the Avoidance after Induction is declar'd by the Act of 21 H. 8. (to (e) which every one is Party) there he ought in such Case to take Notice at his Peril: But admitting that the first Church was not void *de facto* by the Institution till the Induction, yet for another Cause the Dispensation made comes to late, for the Words of the Act of 21 H. 8. are, *May purchase Licence to receive and keep two Benefices with Cure of Souls*, and the Words of the Dispensation in the Case at Bar are *reciper' & retin'*; and forasmuch as by his Institution, the Church was full of him, he could not purchase Licence to receive that which he had before and the Words are in the Conjunctive *recip' & retin'*, so that he could

(a) Co. Lit. 344. a.
Lanc. 20.

(b) 3 Co. 30. b.

(c) Antea 75. b.
Dyer 327. pl. 7.
6 Co. 29. b.
Cawly 23.
(d) 1 Jones 404.
Hob. 166.
Cr. Car. 357.

(e) Antea 76. a.
Doct. pl. 337.
2 Rotis 466.

could not retain that which he could not receive. And it appears by the said Judgment *in Communi Banco*, that within the said Act of 21 H. 8: he who is only instituted is said to have a Benefice with Cure; and the Question as to this Point was asked of the other Justices and Barons of the Exchequer, and they all agreed, That the Dispensation in the Case at Bar came too late for the Reasons aforesaid. And *the Attorney General, Tanfield, and Francis Moor* were of Counsel with the Plaintiff, and *George Crook, Lawton* and others with the Defendants.

Trin.

Trin. 41 ELIZABETHÆ Regina.

NOKES'S Case.

Cr. El. 674, 675.
2 Brownl. 213.
Cr. Car. 176.
Co. Lit. 139. b.

Between *Nokes* Plaintiff, and *James* Defendant, in Debt on a Bond, the Case was such: The Defendant demised to the Plaintiff an House in *London* by these Words, *Demise, Grant, &c.* and the Lessor covenanted that the Lessee should enjoy the House during the Term without Eviction by the Lessor, or any claiming under him, and the Lessor was bound to perform all Covenants, Grants, Articles, and Agreements, &c. in the Indenture: The Plaintiff granted his Term over to a Stranger, in Debt upon this Bond, the Defendant pleaded Performance of the Covenants, &c. The Plaintiff assign'd the Breach, that one *Savery* enter'd upon the Assignee, and made a Lease for seven Years to one *Ducke*, if he should so long live, who brought *Ejectione firma* against the Assignee, and recover'd by Verdict, and had Execution; upon which the Defendant demur'd in Law. And the Opinion of the Court was against the Plaintiff; And in this Case these Points were resolv'd: 1. That for this Covenant in (a) Law upon these Words, *demise, (b) grant, &c.* the Assignee shall have a Writ of Covenant, 9 *Eliz. Dyer* 257. agrees. 2. That for this Breach of the Covenant in * Law, the Bond was forfeited, for he was bound to perform all Covenants, Grants, &c. which extends as well to Covenants in Law, as to Covenants in Deed. 3. Altho' the Recovery was by Verdict, yet the Plaintiff ought to have shew'd that *Savery* had (d) ancient Title, for otherwise the Covenant in Law was not broken, and because he did not shew that, for this Reason they resolv'd against the Plaintiff. 4. It was held by *Popham C. J. & totam Curiam*, That the said exprefs Covenant (e) qualify'd the Generality of the Covenant in Law, and restrain'd it by the mutual Consent of both Parties, that it should not extend further than the exprefs Covenant, *Quia clausula (f) general' non refert' ad expressa* in this Case. And so

(a) *Vaugh.* 126.
1 *Sid.* 447.
2 *Brownl.* 214, 215.
Dyer 57. a.
(b) 5 *Co.* 17. a.
25 *H. 8.*
Br. Covenant 32.
3 *Co.* 63. a.
F. N. B. 146. c.
(c) *Cr. El.* 809.
Yelv. 175.
Cr. Jac. 73, 234.
* *Cr. El.* 674, 675.
(d) 2 *Rol. Rep.* 6,
28, 287.
2 *Brownl.* 214.
Cr. Ek. 675.
Hob. 35.
Doct. pla. 86.
Vaugh. 122.
Cr. Jac. 315.
Palm. 339.
Moor 861.
(e) *Cr. El.* 674, 864
Winch. 92, 93.
1 *elv.* 175. 1 *Budst.* 3, 4. 2 *Brownl.* 212, 213, 214. *Cr. Jac.* 214. *Cr. El.* 864. 1 *Sid.* 328. 1 *Saund.* 69.
I. it. Rep. 64, 206. *Vaugh.* 126. *Raym.* 46. *Co. Lit.* 384. a. (f) *Antea* 73. b. *Lk. Rep.* 345.

was

was it now lately adjudg'd in (a) *Hamond's Case* in this Court. (a) Cr. El. 675. Vaugh. 126.

Vide Reader 20 E. 3. *Counterplea de Garranty* 7. it is adjudg'd, that if a Man leases for Life rendring Rent, (b) and further binds himself and his Heirs to Warranty, here the exprefs Warranty doth not toll the Warranty in Law, for if he in the Reversion grants over his Reversion, and the Lessee attorns, and afterwards is impleaded, he may (c) vouch the Grantee by the Warranty in Law, or he may vouch the Lessor by the exprefs Warranty; and therewith agrees 31 E. 3. *Voucher* 289. (d) where the Case was, L. seised of 3 Oxgangs of Land leased by Deed to C. for Life, rendring Rent and Services, and bound himself and his Heirs to Warranty, and afterwards granted the Reversion to one R. C. L. dy'd, his Wife brought a Writ of Dower against C. who vouch'd the Heir of L. by Force of the exprefs Warranty. And there *Howard C. J.* said, if she had two Warranties, she may choose which she will; but *Nota*, in both the said Cases the Warranty in Law and the exprefs Warranty were general. And I heard the Lord *Dyer*, and the whole Court of Common Pleas, *Hill. 14 Reg. El.* resolve, That if a Man makes a Feoffment by Deed by this Word (e) *Dedi*, and with exprefs Warranty in the Deed, he may use the one or the other at his Election. (e) Lit. Rep. 64. Co. Lit. 384. a. 1 Bulfr. 3. And that the Statute *de Bigamis, cap. 6.* is to be intended, That (f) *Dedi* imports a Warranty, altho' the Clause of Warranty be not contain'd in the Deed. The Letter of which Statute is, (g) *In chartis ubi continetur dedi & concessi, &c. sine clausula warrantie, ipse feoffator in vita sua, &c. sine warrantia, &c. id est quamvis nullam continet clausulam warrantie, &c. sine warrantia*: But *Nota* by Force of the said Act, now *Dedi* is made an exprefs Warranty during the Life of the Feoffor: And there is great Reason in the principal Case, that the particular Covenant subsequent, should qualify the general Force of this Word *demisi*, for otherwise the particular Covenant would be in vain, if the Force of this Word *demisi* should stand; and also these Words (h) *demisi & concessi* are frequent in every ordinary Lease that is made; and the best (i) Construction of Deeds is to make one Part of the Deed expound the other, and so to make all the Parts agree, & *quoad fieri possit* according to the true Intent and Meaning of the Parties, *vide* 48 E. 3. 2. If a Man makes a Lease for Life by this Word *Dedi*, and afterwards grants over the Reversion, the Lessor shall be vouch'd by Force of the *Dedi. Lib. 1. 2. b.* (f) 2 Inst. 275, 276. 6 H. 7. 2. a. Dal. 101. pl. 35. Cr. El. 861. Co. Lit. 384. a. 1 Co. 2. b. Yelv. 139. 5 Co. 17. a. Perk. Sect. 124. (g) Co. Lit. 384. a. Pref. Rolls Abr. pag. 7. (h) 1 Sid. 430. 1 Vent. 44. Hob. 12. Cr. Jac. 73. 5 Co. 17. a. 18. a. Cr. El. 214. (i) Lit. Rep. 187. 2 Co. 23. b. Co. Lit. 314. b.

Mich. 41 & 42 Regina ELIZ.
In the Court of Wards.

Sir ANDREW CORBET's Case.

1 Bulst. 252.
1 Jones 25.
1 Vent. 202.
2 Rolls Rep. 13.

SIR *Andrew Corbet* Knight, 16 *Eliz.* seized of divers Manors, Lands, and Tenements in Fee, Part of which was held of the Queen by Knights Service in *Capite*, by his Will in writing devised some of them to *Richard Corbet* and others to have and hold to them and the Survivor of them until such Time and Term as the Sum of 800 *l.* by them or the Survivor of them, or the Executors of the Survivor of them, of the Issues, Rents, Revenues, and Profits of the said Lands should be fully levied and receiv'd above all Charges and Expences; and the said Sum so levied to be employ'd for the Preferment of his two Daughters *Margaret* and *Mary*, as in this Will is limited, and left a third Part to descend. The said *Sir Andrew* anno 20 *Eliz.* dy'd, *Robert Corbet* his Son and Heir took the said Will into his Hands, and entred into the said Lands now in Charge, and receiv'd the Profits thereof during his Life, and afterwards dy'd in anno 25 *Eliz.* after whose Death, upon the Search of Evidences the said Will was found at *Morton Corbet*, which Will was found in the Office after the Death of the said *Robert*, and then transcrib'd into this Court; by Virtue of which Will the said *Rich. Corbet* the Devisee enter'd and hath receiv'd the Profits of the said Land from the Feast of *St. Michael* anno 26 *Eliz.* until the Feast of the Annunciation anno 36 *Eliz.* and by such Time had levied 640 *l.* and had employ'd it according to the Will; and if the Profits taken by *Rob. Corbet*, and which the Devisees might have taken, should be accounted Parcel of the said Sum of 800 *l.* was the Question: And in this Case 2 Points were resolv'd. 1. That altho' the Words are until the Sum

of

of 800 l. shall be levied by them of the Profits of the Land; yet it is as much in Law, as if the Words had been, shall or (a) may be levied; and fo it was held in Case of a Lease, where the Limitation of an Use until such Sum shall be lev'd, is as much as to say until such Sum can be lev'd, for otherwise great Mischiefe would ensue; for inasmuch as he in Reversion or Remainder can't enter 'till the Sum is lev'd, it would be in the Power of them who are appointed to levy the Sum, if they would defer the levying thereof, to exclude him in the Reversion or Remainder, from taking the Profits of the Land for ever, which would be inconvenient: So it was agreed upon the Words of *W. 2. cap. 18. Quod* (by Force of the *Elegit* which is given by the same Statute) *viccomes liberet, &c. medietatem terræ suæ quousq; (c) debitum fuerit levat per rationab' extenti*; And upon the Words of the Writ of Execution of a Statute Merchant and (d) Staple, *omnia terras & tenementa, &c. habend', &c. juxta form' ordinationis inde fact', scil't. de Mercatorib' 31 E. 1. or 27 E. 3. quousq; sibi de debito præl' fuit satisfactum*, that if the Conusee neglects to take the Profits, yet when the Conusee might have been satisfy'd his Debt according to the Extent, the Conusor shall have his Land again: But it was said that Words make a Plea, and therefore it was agreed, that upon the Statute of *Merton, cap. 6 & 7.* that the Profits of the Land which the Guardian takes for the (e) double Value shall be in Satisfaction of the double Value, but otherwise in Case of (f) single Value, for the Words of the said Act (g) *cap. 6.* in Case of the double Value are, *Tunc teneat terram ejus ultra terminum etatis sue per tantum tempus quod inde possit percipere duplitzem valorem maritagii*: So that by express Words the Profits shall be accounted Parcel of the double Value; but the Words of the 7 Chapter concerning the single Value are, *Si quis heres, &c. pro domino suo noluit se maritare non compellatur hoc facere, sed cum ad etatem pervenerit det domino suo & satisfaciat ei; &c. pro maritagio suo antequam terram suam recipiat*, by which it appears, that the Guardian shall enjoy the Profits to his own (h) Use until the Heir satisfies him, vide for this Difference, *27 H. 8. 5. b. 31 Ass. 26. 43 E. 3. 21.* And further it was held, that in the said Case of the double Value, it is in the Election of the Guardian, either to bring his Writ of Forfeiture of Marriage, or to hold the Land until he is satisfy'd, *18 E. 3. 18. acc.* But if the Guardian chuses to have the Land, and enters into it, he shall not have the Land but only so long that he might levy the double Value, and his Negligence shall be his own Damage: *Vide 15 H. 4. 5. b. 7 H. 6. 12. 15 H. 7. 14. 11 H. 6. 8. a. 2.* It was resolv'd, that when the Heir himself in the Case at Bar, (i) or he in Reversion or Remainder in the Case of a Lease, or Limitation of an Use enters upon him to whom the Land is devised, demised, or limited, as is aforesaid,

(a) Carter 77378:
1 Vent. 202.
Moor 556.
Bridgm. 82:
Noy 33:
Cr. El. 800.
(b) Bridgm. 82:
Cart. 77.

(c) Bridgm. 42:
Cart. 77.

(d) F.N.B. 1131.D:

(e) Bridgm. 82:
2 Inst. 91.
(f) 2 Inst. 93.
(g) Co. Lit. 20378:

(h) 2 Inst. 93:

(i) Cart. 77378:

Sir ANDREW CORBET's Case. PART IV.

and puts him out, in that Case it is in the (a) Election of such Person so put out, either to bring his Action and recover the mean Profits, which shall be accounted Parcel of the Sum, or he may re-enter and shall hold the Land over until he levies the whole Sum, and the Time in which he was so put out, shall not be accounted Parcel; for when he who is to have the Land again doth the Wrong, against him and all others who claim under him, he who was put out, if he will, may re-enter and hold the Land, and the other shall not take Advantage of his own Wrong, nor compell him who was put out to bring an Action against him, against his Will, for the mean Profits: The same Law is in the other Cases, *f.* of Tenant by (b) *Elegit*, Statute Merchant, (c) Statute Staple, Guardian, who holds over for the double Value, if he in Reversion who is to have the Land again ousts him, they have such Election as is aforesaid, either to hold over or to bring their Action, *vide* 15 H. 7. 14. So if the Profits of the Land are wasted, by drowning of Water or (d) Wildfire, or any other Act of God, without Default or Negligence in the Party, there the Conufee shall hold the Land over, *vide* 11 H. 6. 7. 7 H. 7. 12. b. 15 H. 7. 14. 33 H. 8. Statute Merchant Br. 41. But if he who has such Interest be ousted by a (e) Stranger, there the Time shall incur for the Mischief aforesaid, and there he is put to his Remedy against the Trespassor. If the Devisee in the Case at Bar, or Tenant by Statute Staple, &c. (f) surrenders to him in Reversion upon Condition, and afterwards enters for the Condition broken, he shall not hold over, for the Surrender is his own Act, and he can't enlarge his Interest, and therewith agrees 33 H. 8. Statute Merchant Br. 4. If Tenant by *Elegit* is interrupted in taking the Profits of the Land, by Reason of War, he shall not hold over, but it shall be in Disadvantage of the Tenant by *Elegit*, as it is adjudg'd in 19 E. 1. Execution 246. 3. It was resolv'd, that altho' the Devisee had not (g) Notice of the Devise, yet if a Stranger had occupy'd the Land, the Devisee ought to take Notice at his Peril, for (h) *vigilantibus & non dormientibus jura subveniunt*; and none by the Law in such Case is bound to give him Notice, *ideo* he ought to take Notice at his Peril, as in Case of Arbitrement (i) 1 H. 7. 5. & 8 (k) E. 4. 1. but the Case at Bar is stronger, because the Heir himself conceal'd the Will, and the Devisee had no Remedy for the mean Profits after the Death of the Heir, who ousted him; and where it is held in ancient Books, *f.* 34 E. 1. Gard 129. 34 E. 1. Covenant 26. 33 H. 6. 42. 5 H. 7. 36. 7 H. 7. 12. 14 H. 7. 27. 15 H. 7. 8. F.N.B. 142. b. that the (l) Guardian shall oust Tenant for Years, but not Tenant for Life, because Ten. for Life can't hold over as Lessee for Years (as it was held) may: It was resolv'd, that the Guardian shall oust neither, and therewith agrees

(a) Cart. 77, 78.

(b) 2 Saund. 72.
Hardr. 82.
(c) 2 Roll. 478.

(d) 2 Roll. 478.
Aley 27.

(e) 2 Roll. 478.
2 Sand. 72.

(f) 2 Roll. 479.
494. 2 Vent. 328.
1 Roll. 412.

(g) 1 Vent. 202.
1 Rol. Rep. 286.
2 Rol. Rep. 152.
Winch 105, 117,
118.
Palm 73.
Cr. Car. 577.
(h) Antea 10. b.
1 Sid. 55.
2 Inst. 690.
2 Co. 26. b.
Palm. 157.
3 Keb. 19.
Raym. 20.

(i) 8 Co. 92. b.
Br. Condition 124
March Arb. 191.
(k) 8 Co. 92. b.
Cr. Jac. 146.
Br. Notice 12, 18.
Fitz. Arbit. 15.
Br. Arbitrem. 37.
March Arbit. 190
Huer. 81.
(l) Lane 35.

agrees

PART IV. *Sir ANDREW CORBET's Case.*

agrees the Resolution of all the Justices in 36 H. 8. *Leases Br. 58.* It was likewise resolv'd, That if the Guardian may oust the Lessee for Years, yet forasmuch as his Term is certain, *s.* certain in Beginning in Continuance, and in End, he can't by any Possibility hold over in such Case: But in the Case at Bar, and in the other Cases of Tenant by *Elegit*, Statute Merchant, &c. there is no Term certain, but until such a Sum be by them levied, and therefore it stands with such Interest, that in some Case he may hold over, and so a ¹ Jones 25. Difference. And it was said, That the Words of the Statute of * *Marlebridge*; *Salva sit nihilominus bujusmodi feoffa-* ^{* Marleb. cap. 6.} *is actio sua, quoad terminum, seu ad feodum recuperandum,* ^{2 Inst. 109.} *quam inde habuerint*, that is to be intended of an Estate or Lease made by Collusion, for to that the Purview of the said Act extends, *s.* That the Guardian shall oust him, and in such Case without Question the Lessee shall not hold over.

M 3

Paschæ

Pascha 43 Regina ELIZABETHÆ.
In the King's Bench.

SOUTHCOTE's Case.

Cro. El. 815.

Southcote brought *Detinue* against *Bennet* for certain Goods and declared, that he delivered them to the Defendant to keep safe; the Defendant confessed the Delivery, and pleaded in Bar, that after the Delivery one *J. S.* stole them feloniously out of his Possession; The Plaintiff replied, that the said *J. S.* was the Defendant's Servant retained in his Service, and demanded Judgment, &c. And thereupon the Defendant demur'd in Law, and Judgment was given for the Plaintiff; And the Reason and Cause of their Judgment was, because the Plaintiff delivered the Goods to be safe kept, and the Defendant had took it upon him by the Acceptance upon such Delivery, and therefore he ought to keep them at his Peril, altho' in such Case he shou'd have nothing for his safe keeping. So if *A.* delivers Goods to *B.* generally to be (a) kept by him, and *B.* accepts them without having any thing for it, if the Goods are stole from him, yet he shall be charged in *Detinue*, for to be kept, and to be kept safe is all one. But if *A.* accepts Goods of *B.* to keep them as he would keep (b) his own proper Goods, there if the Goods are stollen he shall not answer for them: Or if Goods are pawned or pledged to him for Mony, and the Goods are stollen, he shall not answer for them, for there he doth not undertake to keep them but as he keeps his own; for he has a Property in them and not a Custody only, and therefore he shall not be charged as it is adjudged in 29 *Aff.* 28. But if (c) before the stealing he who pawned them tendred the Mony, and the other refused, then is there Fault in him, and then the stealing after such Tender, as it is there held, shall not discharge him: So if *A.* delivers to *B.* a (e) Chest lockt to keep, and he himself carries away the Key, in that Case if the Goods are stollen, *B.* shall not not be charged,

(a) 1 Leon. 224.
Owen 141. 1 Rol.
338. Cro. El.
219. 10 H. 6.
21. a. Co. Lit.
89. a. Dr. &
Stud. 129. a. b.
Moor 543. Palm.
549. 550.
(b) Co. Lit. 89. a.
(c) 1 Roll. 338.
Co. Lit. 89. a.
Palm. 550.

(a) 1 Roll. 338.
Co. Lit. 89. a.

(e) Co. Lit.
89. a. b.

charged, for *A.* did not trust *B.* with them, nor did *B.* undertake to keep them, as it is adjudged in 8 *E.* 2. *Detinue* (*a*) 59. So the Doubt which was conceived upon sundry differing Opinions in our Books, in 29 *Aff.* 28. 3 *H.* 7. 4. 6 *H.* 7. 12. 10 *H.* 7. 26. of *Keble* and *Fineux* are well reconciled, *vide Braçt. lib. 2. fol. 62. b.* But in Accompt it is a good Plea before Auditors for the (*b*) Factor, that he was robbed as appears by the Books in 12 *E.* 3. *Accompt.* 111. 41 *E.* 3. 3. & 9 *E.* 4. 40. For if a Factor (altho' he has Wages and Salary) does all that which he by his Industry can do, he shall be discharged, and he takes nothing upon him, but his Duty is as a Servant to merchandize the best that he can, and a Servant is bound to perform the Command of his Master: But a Ferryman, (*c*) common Inn-keeper, or Carrier, who takes Hire ought to keep the Goods in their Custody safely, and shall not be discharged if they are stollen by Thieves, *vide* 22 *Aff.* 41. *Br. Atizon sur le Case* 78. And the Court held the (*d*) Replication idle and vain, for *non refert* by whom the Def. was robbed, *vide* 33 *H.* 6. 31. *a. b.* If (*e*) Traitors break a Prison it shall not discharge the Gaoler, otherwise of the King's Enemies of another Kingdom, for in the one Case he may have his Remedy and Recompence and in the other not. *Nota* Reader, it is good Policy for him who takes any Goods to keep, to take them in special Manner, *scil.* to keep them as he keeps his own Goods, or to keep them the best he can at the Peril of the Party; or if they happen to be stollen or purloined, that he shall not answer for them, for he who accepteth them, ought to take them in such or the like Manner, or otherwise he may be charged by his general Acceptance. So if Goods are delivered to one to be deliver'd over, it is good Policy to provide for himself in such special Manner for Doubt of being charged by his general Acceptance, which implies that he takes upon him to do it.

(a) Co. Lit. 89. a. b.

(b) Co. Lit. 89. a. 1 Roll. 124. Moor 442. Doct. pl. 13. 1 Brownl. 25.

(c) 1 Sid. 36. Aleyn 93. Palm. 523. 2 Sand. 380. 1 Roll. 2. 124. 2 Roll. 567. 1 Roll. Rep. 79. 2 Bullfr. 280. Cro. Jac. 262. 330. 331. Hob. 175. 18. Co. Lit. 89. a. Moor 462. 1 Vent. 190. 191. 238. 239. 3 Keb. 72. 73. 74. 112. 113. 114. 135. 1 Mod. Rep. 85. 2 Mod. Rep. 270. (d) 2 Bullfr. 249. (e) 1 Roll. 808. Dyer 66. pl. 15. 241. pl. 47. Cro. El. 815. Palm. 550. Jenk. Cent. 227. Br. Det. 22. Fitz. Barr. 57.

Termino Paschæ, Anno Regni
Domina ELIZABETHÆ *nuper*
Regina Angliæ 43. Rot. 569.

LUTTRELL's Case.

Somerf. ff.
 3 Inii. 204.

Memorandum quod al's scilicet Termino sancti Michaelis ultimo præterito, coram domina Regina apud West. ven' Edw. Cottell gener' per J. Nightingale attorn' suum, & protulit hic in cur' dictæ dom' Reg. tunc ibidem quandam billam suam vers' Geo. Luttrell armig. R. Norcome, & J. Quick in custod' Mar' &c. de pl'ito Transgr' super casum, Et sunt plég. de prosequend', scz. Joh. Doo, & Ric. Roo; Quæ quidem billa sequitur in hæc verba, ff. Somerf. ff. Ed. Cottell gener', queritur de G. Luttrell armig', Ro. Norcome, & J. Quick in custod' Marr' Marefc. dom' Reg. coram ipsa Reg. existen', pro eo viz. qd' cum idem Ed. 4. die Maii an. regni dominæ Eliz. nunc Reg. Angliæ 41. ac antea seifitus fuisset, de & in duob' antiquis & ruinosis molendinis fullonicis cum pertin' in Dunster in com' præd' in dominico suo ut de feodo, ad quæ quid' molendina fullonica magna pars aq; cujusdam rivoli in D. præd' a quodam loco voc' *the head weare* ejusd' rivoli in D. præd', dicto 4 die Maii ann' 41. suprad' currebat, necnon præantea a tempore cujus contrarii memoria hominum tunc non exiitit continue currere consuevit & solebat; cumque etiam præd' 4 die Maii anno 41. suprad', ac antea a toto præd' tempore cujus contrarii memoria hominum tunc non existerat pro preservat', directione, & continuatione recti curs. dict' magnæ partis aquæ rivoli præd' ad molend' fullonica præd', quæd' densa ripa Angl' a *thick bank* de meremio & terra construct' scit' fuisset prope & supra molend' præd' ad occident' part' curs. præd' magnæ partis præd' aq; rivoli præd', & contigue adjac' fuisset cuidam stratæ

Creꝝ Car. 500.

stratæ communiter voc' *West Street* in Dunster præd': Ac etiam cum idem Edw. de præd' molendinis fullonicis cum pertinentiis in forma præd' feisit' existens, postea scilicet vicesimo octavo die Octobr', anno regni dictæ dom' reg' nunc quadragesimo primo suprad', præd' duo molendina fullonica ut præfertur ruinosa existen' totaliter devulsisset, ac postmodum scz. vicesimo die Junii, anno regni dictæ dom' reg. nunc 42. apud Dunster prædict. in com. præd' in locis eorundem, ac ubi præd' duo molendina fullonica antea construct' ac ædificat' fuissent, super præd' magnam partem prædict' aquæ rivoli præd' duo molendina granatica pro molatione granorum de novo ædificasset, erexisset, & perfecisset, per quod idem Edw. ad tunc feisit' fuisset & adhuc feisit' existit de eisd' 2. molendinis granaticis per ipsum sic ut præfert' de novo ædificat', erect', & perfect. in d'nico suo ut de feodo, ac præd' magna pars aquæ rivoli prædict' in Dunster præd' a præd' loco voc' *the head weaze* ejusd. rivoli in Dunster præd', a tempore novæ ædificationis, erectionis, & perfection' præd' duorum molendin' granaticorum, usque decimum diem Sept. tunc proxim. sequen' currebat: quorum prætextu idem Edw. post ædificationem eorundem duor' molendinorum granaticorum usque eundem decimum diem Septem. diversa lucra & proficua de diversis ligeis dict. dominæ reg. nunc pro molatione granorum suorum apud ead. molendina granatica molitorum acquisivisset præd' tamen Geor. Ro. & Joh. præmissorum non ignar', maliciose machinant' & intendunt' ipsum Ed. minus juste prægravare, ac ipsum de proficuis præd' molendinorum suorum granaticorum totaliter impedire & deprivare, apud Dunster præd'. præd' decimo die Sept' anno quadragesimo secundo supradicto, prædictam densam ripam foderunt & fregerunt, & totam prædictam magnam partem præd' aq. rivoli prædicti, quæ ad præd' molendina granatica ipsius Edw. a prædicto loco voc' *the head weaze* currebat & currere debuit & solebat, ab antiquo & solito cursu suo, viz. in præd' stratam commun' voc' *the West Street* in Dunster præd' diverter' & substraxerunt, per quod idem Ed. tota proficua molendinorum granaticorum suorum præd' per magnum tempus, viz. a præd' decimo die Sept', anno quadragesimo secundo supradicto, usque diem impetrationis hujus billæ, scz. vicesimum diem Novembris, anno regni dict' dom. reg. nunc quadragesimo tertio totaliter amisit & deperdidit ad dampnum ipsius Ed. ducentarum librarum; Et inde produc' sectam &c. Et modo ad hunc diem, scilicet diem Mercur' prox. post quinden' Paschæ isto eodem term', usque quem diem prædicti Georgii Roberti & Johanni Quick habuerunt licentiam ad billam prædict' interloquend', & tunc ad respondendum, &c. coram Domina Regina apud Westmonasterium ven'tam prædict. Edw. per attorn' suum

Palm. 504.

Palm. 504.

LUTTRELL's Case. PART IV.

suum præd', quam præd' Geor. Ro. & Jo. Quick per Steph. Brodrippe attorn' suum, & idem G. R. & Jo. defend' vim & injur' quando &c. Et dicunt quod ipsi non sunt inde culpabil', & de hoc pon' se super pr'iam: Et præd', Edward. sil'iter &c. Ideo ven' inde Jur' coram d'na reg. apud West. die Jovis prox. post quinden' sanct' Trin', Et qui nec &c. ad recogn' &c. Quia tam &c. Idem dies dat' est part' præd' ibm' &c. Postea continuat' inde processu inter partes præd' de pl'ito præd' per Jur' posit' inde inter eas in respect' coram domina reg. apud West. usque diem Veneris prox. post Octab. sancti Mich. extunc prox. sequen', Nisi Justic' d'næ reg. ad assisas in com' præd' capiend' assign', prius die Jovis 6 die Aug. apud Castr' Taunton' in Com' præd' per form' statuti &c. ven' pro defectu Jur' &c. Ad quem diem coram d'na reg. apud West. ven' partes prædict' per attorn' suos præd', Et præf. Just. ad assis. cor' quibus &c. miser' hic record' suum coram eis habitum in hæc verba. ff. Postea die & loco infracontent', coram W. Periam Milite capitali Baron' Scaccar' d'næ reg. & Ed. Fenner uno Justic', dist. d'næ reg. ad pl'ita cor' ipsa reg. tenend' assign', Justic' ejusdem d'næ reg. ad assis. in com. Somers. capiend' assign' per form' statuti &c. ven' tam infranominat' Ed. Cottel gen' per Adrian' Street attorn' suum, quam infrascr' Geor. Luttrell arm', Ro. Norcome, & Jo. Quick. per Hen. Collier attorn' suum, Et Jur' jurat' unde infra fit mentio exact' sil'iter ven', qui ad veritatem de infracont' dicend', electi, triati, & jurati, dicunt super sac'r'm suum quod præd' G. Ro. & Jo. sunt culpabiles de præmissis eis interius imposit', prout præd' Ed. Cottell interius versus eos queritur, & assidunt dampna ipsius Ed. occasione infrascr', ultra mis. & custag' sua per ipsum circa se&t suam in hac parte apposit', ad 40 s. & pro mis. & custag. illis ad 5 s. Ideo concess. est qd' præd' Edw. recuperet versus præf. G. R. & Jo. dampna sua præd' per Jur. præd' in forma præd' assess. necnon sex libras pro mis. & custag. suis eidem Edw. per cur' d'næ reg. hic ex assensu suo de incr'o adjudicat': Quæ quidem dampna in toto se attingunt ad octo libras & quinque solid. Et præd' Geor. Ro. & Joh. in m'ia &c.

Paschæ 43 ELIZABETHÆ Rot.
596, *between Cottell Plaintiff
and Luttrell Defendant, in
an Action on the Case in B. R.*

LUTTRELL'S Case.

Cottell brought an Action on the Case against Luttrell, ^{Hutton 58.} and declared that 4 Martii anno 40 Eliz. he was seized in Fee of two old and ruinous Fulling Mills, and that from Time whereof Memory, &c. magna pars aqua cujusdam rivoli ran from a Place called Hodwear to the said Mills, and that for all the said Time there had been a Bank to keep the Water within the Current, and that afterwarwards the Plaintiff 8 Octob. 41 Eliz. pull'd down the said Fulling Mills, and in June 42 in Place of the said Fulling Mills, erected two Mills to grind Corn; and that the said Water ran to the said Mills 'till the 10 Sept. next following, and that the same Day the Defendants *foderunt & fregerunt* the Bank, and diverted the Water from his Mills, &c. The Defendants pleaded Not guilty, and it was found against them, upon which the Pl. had Judgment. Upon which Luttrell the Def. brought a Writ of Error upon the new Statute in the Exchequer Chamber, and there two Errors were assigned. 1. That by the breaking and abating of the old Fulling Mills, and by the building of new Mills of another Nature, the Pl. had destroyed the Prescription, and could not prescribe to have any Water-Course to Grist Mills: As if a Man grants me a Water-Course to my Fulling Mills, I can't (as it was said) convert them to Corn Mills, *nec e contra*. So if I grant to one Estovers to burn in his Hall, he can't convert his Hall into a Kitchen, or Malt-house: The same Law of a Prescription; for Prescription in such Case shall be intended to commence by Grant, and in Proof thereof they cited *F. N. B.* 180. *H. And 7 E. 4. 27. a.* if a Man has Estovers by Grant, or appendant to an antient House, he shall not have them to an House which he new builds: And 10 *H. 7. 13. a. b. & 16 H. 7. 9. a. b.* where the Abbot

1. Roll. 104.
22 H. 6. 14.

27 El. cap. 8.
Cro. Car. 45.

9 E. 4. 11. 7
Lit. 41. b.
3 Bulstr. 3.
2 Cro. 25. 1

bot

LUTTRELL's Case. PART IV.

bot of *Newark* granted by Fine to find three Chaplains in such a Chappel of the Conusee, and afterwards the said Chappel fell, and there *tenetur* (during the Time that there is no Chappel) the Divine Service shall cease, for it ought to be done in a decent and reverend Manner, and not at large *sub dio*; But there *tenetur* if the Chappel is rebuilt in the same Place where the old stood, then he ought to do the Divine Service there: But (it was collected) if it is built in another Place, there the Grantee is not bound to do Divine Service there: If there be Lord and Tenant, and the Tenant holds to cover and repair the (a) Lord's Hall, as in 10 E. 3. 23. in this Case if the Hall falls, yet if the Lord builds the Hall in the same Place where it was before, and of such Bigness as it was before, the Tenant is bound to cover it; But if it is of greater Length (b) or Breadth, so as Prejudice may come to the Tenant, or if it is built in another Place, or if that which was the Hall is converted to a Cowhouse, Stable, Kitchin, or the like, he is not bound to cover it, for the Lord by his Act can't alter the Nature of the Tenure, nor of the Service which the Tenant ought to do: And in this Case here, it might be more beneficial to him who made the original Grant, and to others who had his Estate to have them Fulling Mills, than Corn Mills: For perhaps they have Corn Mills so near, that the building of Corn Mills would be prejudicial to them, and it would be against Reason to extend a Grant or Prescription to have a Water-Course to Fulling Mills, to Corn Mills, which is not within the Purport or Intention of the Grant or Prescription, and the Grant or Prescription ought to be pursued: If a Man holds of another as of his Manor by Homage, Fealty and Castle-guard the Lord aliens the Manor except the Castle, there the Alienee shall not have (c) Castle-guard, as appears by 31 E. 3. Ass. 441. And it was said, that there the Alienee can't build a new Castle, for the Tenure was to keep the old Castle. Another Objection was made, forasmuch as the Pl. himself has broke and abated the Fulling Mills, altho' he builds new Mills in the same Place, and of the same Nature as the old were, yet he has destroyed his Prescription; for altho' in Casewhen Mills or Houses which have Water-Course, or Estovers, or other Things appendant or appurtenant to them be overthrown by the Wind, or burned by Wild-fire, or fall by any other Act of God, that if the Owner rebuilds them in the same Place, and in the same Manner as they stood before, that they shall have the same ancient Things Appendants and Appurtenants to this new Mill or House, because the Act of God shall not prejudice any; yet if they be erased by the Party himself, or fall thro' his Default, the ancient Appendants thereby are lost; for by his own Act he cannot extend the Prescription or Grant which was in a Manner appropriated to the

1 Roll. Rep.
123.

(a) Winch. 45.
Noy 127. Perk.
Sect. 671.
Kclw. 37. b.

(b) Noy 127.
Perk. Sect. 671.

(c) Co. Lit.
83. a. 2 Roll.
513.

2 Cro. 182.
Moor 877.

the old House, to a new House: So it was objected, That if one of his own wrong, burns, or pulls down the House or Mill which has such Appurtenances, he shall recover all in Damages; and altho' in such Case he rebuilds the House or Mill, yet he shall not have the Appendances, *vide Perkins (a)* 128. *b.* But it was resolved, That the *(b)* Prescription did extend to these new Grift Mills, for it appears by the *Register*, and also by *(c)* *F. N. B.* that if a Man is to demand a Grift Mill, Fulling Mill, or any other Mill, the Writ shall be general, *de uno molendino*, without any Addition of Grift or Fulling, 21 *Aff.* 23. agrees of a Plaintiff in Assise. So that the Mill is the Substance, and Thing to be demanded, and the Addition of Grift, or Fulling, are but to shew the Quality or Nature of the Mill, and therefore if the Pl. had prescribed to have the said Water-course to his Mill generally (as he well might) then the Case wou'd be without Question, that he might alter the Mill into what Nature of a Mill he pleased, provided always that no Prejudice shou'd thereby arise, either by diverting or stopping of the Water, as it was before, and it shou'd be intended that the Grant to have the Water-course was before the building of the Mills, for no Body will build a Mill before he is sure to have Water, and then the Grant of a Water-course being generally to his Mill, he may alter the Quality of the Mill at his Pleasure, as is aforesaid: So if a Man has *(d)* Estovers either by Grant or Prescription to his House, altho' he alters the Rooms and Chambers of this House, as to make a Parlour where it was the Hall, or the Hall where the Parlour was, and the like Alteration of the Qualities, and not of the House it self, and without making new Chimneys by which no Prejudice accrues to the Owner of the Wood, it is not any Destruction of the Prescription, for then many Prescriptions will be destroyed, and altho' he builds new *(e)* Chimneys, or makes a new Addition to his old House, by that he shall not lose his Prescription, but he can't employ or spend any of his Estovers in the new Chimneys, or in the Part newly added; The same Law of Conduits and *(f)* Water-pipes and the like: So if a Man has an old Window to his Hall, and afterwards he converts the Hall to a Parlour or any other Use, yet it is not lawful for his Neighbour to stop it, for he shall prescribe to have the Light in such Part of his House: And altho' in this Case the Pl. has made a Question, for as much as he has not prescribed generally to have the said Watercourse to his Mills generally, but particularly to his fulling Mills, yet for as much as in general the Mill was the Substance, and the Addition demonstrates only the Quality, and the *(g)* Alteration was not of the Substance, but only of the Quality, or the Name of the Mill, and that without any Prejudice in the Watercourse

(a) Perk. Sect.

671, 672.

(b) Hurt. 58.

Godb. 237.

Winch. 45.

Poph. 172. Hob.

39. Cro. Jac.

(c) F. N. B. 2. c.

182. Moor 877.

212. b. Reg.

Orig. 2. a. Cro.

Jac. 557.

(d) Co. Lit. 41. b.

2 Leon. 45.

4 Leon. 241.

(e) Hob. 39.

1 And. 151.

2 Leon. 45.

4 Leon. 241.

Godb. 97.

1 Bulstr. 94.

(f) 1 Sid. 167.

291. 1 Ventr.

237.

(g) Cro. Jac

182.

LUTTREL's Case. PART IV.

(a) Godb. 237.
Winch. 45. Hut-
ton 58. Poph.
172. Hob. 39.
Cro. Jac. 182.
Moor 877.

(b) 21 E. 4. 59. a.
3 Co. 74. a.
1 Sand. 344.
Moor 381.
3 Lev. 233.

(c) Co. Lit. 4. a.
2 Rol. Rep. 265.
Palm. 320.
2 Rol. 57. Owen.
75. Moor 360.
2 And. 123. 124.
Cro. El. 658.
476. 477. Godb.
352.

(d) 2 Rol. Rep.
265.

(e) Perk. Sect.
671.

Watercourse to the Owner thereof; for these Reasons it was resolved, that the (a) Prescription remain'd. If a Corporation have Franchises or Privileges by Grant or Prescription, and afterwards they are incorporated by another Name, as where they were Bailiffs and Burgeffes before, now they are Mayor and Comminalty; or Prior and Convent before, and afterwards they are translated into a Dean and Chapter, altho' in these Cases the Quality and Name of their Corporation are (b) altered and changed, and chiefly in the Case of Prior and Convent, for from regular who are dead Persons in Law they are made secular, yet the new Body shall enjoy all the Franchises, Privileges and Hereditaments which the old Corporation or Body Politick had either by Grant or by Prescription, for no Person will be prejudiced thereby; vide 14 H. 6. 12. 37 Aff. 6. 38 Aff. 22. 39 H. 6. 15. Another Reason was added that when a Man has any Thing appendant or appurtenant to an House or Mill, the most perdurable Part of it is the Land in which the Foundation is, and upon which the whole Fabrick of it consists, and in Respect thereof, by Grant of all his (c) Lands, all his Houses, Mills and Woods will pass. And so it was resolved, as Popham-C. J. said, by Wray and Dyer Chief Justices, upon Conference had with divers other Justices upon a Case referred to the said Chief Justices: For in *Præcipe*, where an House, Mill or Wood is demanded, the Warrant of Attorney is *in placito terra*: And in Case of Voucher, when Judgment is given for the Tenant to have in Value against the Vouchee, the Judgment is *Quod habeat de terris* of the Vouchee *ad valentiam*, yet thereby he shall have Houses, Mills, Woods, &c. and in special Cases by Recovery of Lands, a Man shall recover Houses, as it is held by some 4 E. 3. 161. 6 E. 3. 283. 2 E. 3. 37. *Plow. Com.* 168. 8 E. 3. 377. Dyer 28 H. 8. 47. and therewith agrees the Civil Law; for (d) *appellatione fundi, omne edificium & omnis ager continetur*: Then the Prescription or Grant shall respect the most perdurable Part, and which in Judgment of Law includes the whole. And therefore it was resolved that altho' the House or Mill falls by the Act or Default of the Owner, or by the Wrong of another, yet forasmuch as the perdurable Part, and which includes the whole, remains, he may rebuild it without any Loss of any Appendant or Appurtenant to it, but it ought to be upon the same Place which was the old Foundation of the old House: For as that supported and in Judgment of Law included the old House when it stood, so it shall support and include the new House, and so in a Manner a Continuance of the old House, and so the *Quære* which Perkins makes fol. 128. (e) well resol. And so it was said in all the Cases of Estovers and Tenures aforesaid, when the Alteration of the Quality

or Name of Part of the House doth not cause any Prejudice to the Terre-tenant, the Estovers and Services remain: *Et nota* Reader, a Case reported by Serjeant *Bendloes Mich. 3. H. 8. Rot. 649. in Communi Banco, in Repl'* brought by Sir *William Capel (a)* against *Robert Apprice* and others, of four Horses taken in a Place called old *Haddam Park*, in little *Haddam* in the County of *Hertford*; The Defendants made Conufans as Bailiffs to *Rich. Bihop of Lond.* because Sir *Th. Brand Knight* was seised of the Manor of little *Haddam* in Fee, whereof the Place where, &c. was Parcel, and held it of the Bihop of *London, ut de Castro suo de Stortford in Com' præd', per homagium, fidelitatem, & ad (b) sculagium domini Regis xl. s. cum acciderit, & ad plus plus, & ad minus minus, & per redditum v. s. pro Ward' Castri præd' ad festum sancti Michaelis Archangeli annuatim solvend', ac per redditum xiiii s. iv d. pro auxilio vicecom' at four Feasts of the Year, &c.* And for 15 s. for Castle guard behind for three Years, &c. they avowed the taking of one of the said four Horses, and for 40 s. for Aid of the Sheriff behind also for three Years, they avow'd the taking of the other 3 Horses. The Pl. in Bar of the Avowry as to the taking of one Horse for Castle guard said, that before the Beginning of the said three Years, *Castrum præd' funditus corrui & penitus in decasum extitit, & adhuc existit, & hoc paratus est verificare, unde petit judicium si præd' Rich. Apprice, &c. pro aliquo reddito pro Wardo Castri præd' sic obrui & penitus in decasum existen', capt' præd' unius equi justam cognoscere debet, &c.* Upon which it was demurred in Law, and as to the Aid of the Sheriff it was also demurred in Law: And in that Case it was resolved, that altho' the Castle is *ru- in'd and decayed, (c) yet the Rent remain'd; For when the Tenant holds of the Lord to ward or repair the Lord's Castle, and afterwards such Service (as *Lit.* says in the Case of *Socage*) was in ancient Time changed by mutual Consent of the Lord and Tenant into an annual Rent, yet it is said, That such Rent is paid *pro Wardo Castri, id est*, in Satisfaction *Ward' Castri*; for in this Case, and such like, (*pro*) signifies full and perpetual Recompence and Satisfaction, and not conditional, or Satisfaction temporary, *si* for a Time, so that the Lord may have the Castle ward when he will, for the Seisin of the Rent is not Seisin of the Castle-guard in such Case: But if the Tenant holds to guard the Lord's Castle, if the Castle falls, the Service (*d*) is suspended until it is rebuilt, but then the Tenure shall not be in such Case alledged to be by the Rent, but by the Castle Guard, neither shall the Avowry be made as in the Case at Bar it is for the Rent, but for the Castle-guard: *vide Lit. 26. b.* that if a Man holds his Land by certain Rent for Castle-guard, *Lit.* says, that such Tenure is Tenure in (*e*) Socage, which can't be if the Castle-guard remains, for then

(a) Moor 1, 2
Co. Lit. 82. a.
Dav. 3. a. b. N.
Bent. 9, 10. Lit.
Rep. 48.

(b) Co. Lit.
72. D.

* 1 Mod. Rep. 200.
(c) Dav. 3. a. b.
Moor 2. Co. Lit.
82. a. N. Bent.
10.

(d) Co. Lit. 82. a.

(e) Co. Lit.
87. a. b. Co.
20. a. F. N. B.
83. 256.

LUTTRELL's Case. PART IV.

the Tenure shall be by Knight's Service; for *Littleton* saith, that where the Tenant ought by himself or by another to do Castle-guard, that such Tenure is Tenure by (a) Knight's Service, so the Difference between Rent for Castle-guard, and Service to guard the Castle. The same Law if the Tenant holds of his Lord by certain Rent for Work-days, or any other Service. And Sir *William Capel* the Plaintiff perceiving the Opinion of the Court against him for both Points, was nonsuited, and both the Rents as the said Serjeant reports are paid (b) to this Day: And when a Man holds of another in Soccage, or otherwise as of his Castle, and afterwards the Castle falls, and is utterly ruined, yet the Tenure remains; For it must be known That when any Tenure is of any Person as of a Castle, in such Case the Castle includes in itself a Manor, for (c) *Castrum* as a Manor *est nomen generale & collectivum*, and may include in itself divers Things, *s.* Demeans and Services, &c. 5 *H. 7. 9. n.* Land may be Parcel of a (d) Castle, *vide* 29 *H. 6. Travers* 4. That an Hundred may be as well Parcel of a Castle as it may be of a Manor, as it is held in 8 *H. 7. 1.* And therefore when a Tenure is of any as of his Castle (which always in such Case includes in itself a Manor) altho' the Castle is ruined, yet the Tenure remains without Question: *Vide* 19 *E. 2. Ass.* 399. Divers Tenants held of another as of his Manor by Fealty and Suit to the Lord's Mill, the Lord alien'd the Mill, with the Suit of the Tenants, and afterwards the Vendor died, and his Son entered, and conceiving that the Tenants who held of his Manor could not do Suit to him who had not the Manor, of himself made a new Mill elsewhere upon other Parcel of his mesns, and had the Suit to his own Mill which the Vendeed ought to have had; for no Man can have Suit to his Mill by Reason of Tenure if it were not of Corn growing in certain Land, and that within his Seigniority: *Vide* 17 *E. 3. 97.* 29 *E. 3. 12.* 16 *E. 3. Avowry* 92. And by the said Case it appears, that altho' the ancient Mill is aliened, or if it falls, the Lord may erect a new Mill in another Place within his Manor, for the Tenure in such Case is to do Suit to the Lord's Mill generally, and not to any particular Mill; *Nota bene* all these Differences. Another Error was assigned because the Prescription was that *magna pars* (f) *aque cujusdam rivuli*, &c. that it was uncertain how much Water shou'd be comprehended within these Words, *magna pars aquæ*; and Declarations, and especially in Actions on the Case, ought to be certain, and the whole Case ought to be shewed in certain, and if the Truth is that one and the same River before it comes to the Mills divides it self into two Branches, whereof one only

(a) Co. Lit. 32 b.
27. b. F. N. B.
23. c. Lit. Sect.
221.

(b) N. Benl. 10.
Moor 2.

(c) Co. Lit. 5. a.

(d) Plowd.
168. b. 169. b.
Br. Comprise 18.
Fitz. Bar. 143.
Br. præcipe
quod reddat 23.

(e) Co. Lit.
23. a. Dav. 32. b.
Moor 2. N. Benl.
30.

(f) Palm. 504.
Cr. Jac. 324.
2 Rolls 80.
2 Bulstr. 119.

only runs to the Mills, the better Form was to prescribe to have *agua cursum* to the said Mills, for each of the Branches *est aqua cursus*; *Quod fuit concessum* as to this Point; but it was resolved, that altho' the Declaration might have had a better Form, yet in Substance it was good, for it was not possible to shew how much Water runs to Mills, and the Quantity (*a*) of the Water is not material, for as much as the Defendant by the breaking of the Bank diverted the Water which ran to the said Mills; *Vide 8 El. Dyer 248. b. (b)* where in an Action on the Case the Plaintiff declared that the Defendant *divertit multum cursus aqua*; and another President is there cited between *Wikes & Searle*, that an Assise of Nufans was brought *pro diversione majoris partis cursus aqua*, by which the Judgment given by Sir *John Popham* Chief Justice and his Companions Justices of the King's Bench was affirmed. *Not* well this Case which was adjudged by both the Courts.

(a) Doct. Pla. 7
86.
(b) Cr. Jac. 324.
2 Bulstr. 119,
196. Dyer 248.
pl. 80. 1 Leon.
273. 2 Roll.
143. 1 Bulstr.
47.

N

Trin.

Trin. 43 *Reginae* ELIZ.

DRURY's Case.

Mo. 562, 562.

1 And. 201.

Cr. El. 723, 724.

839. Jenk. Cent.

272, 273.

D *Rury* brought a Writ of Error on a Judgment given in the Common Pleas in a *Quare impedit* brought by the Queen, where the Case was; A Countess being a Widow, retain'd 2 Chaplains, and afterwards retain'd a third, which third first purchas'd Dispensation to have two Benefices with Cure, and accordingly was advanced to two with Cure, whereof the first was above the yearly Value of 8 *l.* And if he was lawfully qualify'd within the Stat. of 21 *H. 8. cap. 13.* was the Question in the Common Pleas: For if he was lawfully qualified, then the first Benefice by the Acceptance of the second was not void, & *per consequens* no Title to present by Lapse devolv'd to the Q. and by the pleading it doth not appear that the two first Chaplains were living at the Time when the third was advanced, for it was averr'd only that the two were alive at the Time when the third was retain'd, upon which, great Question arose in the King's Bench: And it was adjudg'd in the Common Pleas, That Title to present by Lapse was devolv'd to the Queen, and therefore Judgment was given there accordingly. And after many Arguments at Bar and Bench upon the Writ of Error in the King's Bench, the Judgment given in *C. B.* for the Queen was affirm'd. And in this Case 2 Points were resolv'd. 1. When the Countess retain'd two Chaplains, these two are capable of a Dispensation according to the said Act of (a) 21 *H. 8.* by which it is provided, *That every Countess being a Widow, may have two Chaplains, whereof every one may purchase Licence or Dispensation.* Then when she retains two, the Statute is executed, for she can't have more than two capable to have Dispensation, and the Retainer of the third can't

(a) Moor 561.
Antea 78. b.

can't divest the Capacity of Dispensation which was vested by their Retainer in the first two; for altho' the Countess might have as many Chaplains as she would at the Common Law, yet she can't have more than two capable of a Dispensation by Force of the Statute; and Reason requires that he who has serv'd longest should be first prefer'd, & (a) *qui prior est tempore, potior est jure*. And so now this Point has been four Times adjudg'd: 1 in the Common Pleas, *Pascha* 31. *Eliz. Rot.* 728. in a *Quare impedit* between the Queen and the Bishop of Lincoln, the President of Maudlin College, and John Skuffing (b) Clark. 2 in the Lady St. John's Case. 3 in this very Case in the Common Pleas; and 4 now in the K's Bench; *vide Dyer* 312. (c) by the Opinion of Catlyn, Saunders and Dyer, if a Lord who is allow'd but three Chaplains, retains six by his Letters Testimonial, at one and the same Time, and all six are prefer'd to six several Pluralities, the three who are first promoted, are warranted by the Statute, and yet the Retainer was not according to the Statute, but *in equali jure* (d) *melior est conditio possidentis*. 2. It was resolv'd, that when the 2 first were retain'd according to the Statute, and thereby the Statute executed as aforesaid, the Retainer of the third, altho' it was good at the Common Law, yet it was void to give him Capacity to purchase Dispensation within the Statute, and therefore altho' the other two were dead before the Advancement of the third, yet so far as they were alive at the Time of his Retainer, which Retainer was at the Common Law, and not according to the Statute, therefore he ought to have had a new Retainer after their Death and before his Advancement, for *quod (e) ab initio non valet, in tractu temporis non convalescet*; As if the Son and Heir apparent of a Baron retains a Chaplain, and gives him his Letters under his Hand and Seal, and afterwards his Father dies, and this Chaplain purchases Dispensation, this Retainer and these Letters will not serve him, because they were not available at the Beginning: And if a Baron retains three Chaplains according to the Statute, and they purchase Dispensation, and are advanced according to the Statute, now if the Lord discharges one of them from his Service, he can't retain another during his Life, for then by such Means he might advance infinite Chaplains without Numb. by which the Stat. would be defrauded, for the Stat.

(a) Co. Lit. 14. b. 347. b.

2 Inst. 95.

(b) Postea 118. 2. Moor 277.

1 And. 201. Cr. El. 724.

Sav. 101, 102. (c) Cr. El. 724. Dy. 312. pl. 82. Moor 440.

(d) Vaugh. 60.

(e) 4 Co. 2. b. Hurr. 51.

Cawly 214. 2 Co. 55. b.

Cr. El. 585. Co. Lit. 31. a.

10 Co. 62. a. 8 Co. 135. b.

Dav. 32. a. 2 Bull. 304, 305.

3 Bull. 192. Jenk. Cent. 272.

DRURY'S Case. PART IV

limits him to three only to have Benefit of the Act: And so was it adjudg'd in the Common Pleas, *Pascha* 28 *Eliz. Rot.* 1130. in a *Quare impedit* between the Queen and the Bishop of Gloucester and Edward (a) Savacre, and affirm'd by a Writ of Error in the King's Bench; and it was said, that the said Act of 21 *H. 8.* shall be taken strictly against Pluralities, and therefore it has been held, that if a Baron, who by the Statute may retain three Chaplains, is made Warden of the Cinque Ports, who may have a Chaplain in Respect of his Office, yet he shall have but three. And so if a Baron has three, and is made an Earl, yet he shall have but five in all, & sic de ceteris.

Tanfield and others were of Counsel with the Plaintiff in the Writ of Error, and the Attorney and others with the Defendant.

(a) 1 And. 200, 201
Godb. 41, 42.
Ow. 51. Sav. 79.

De

*De Termino S. Hill. anno
Regni Dominae Eliz. Reginae
Angliae 38. Rot. 305.*

SLADE'S Case.

Memorandum qd' al's scilicet Termino Sancti Michael' ^{Devon ff.} ultimo præterito, coram domina Regina apud West. ven' Jo. Slade per Nich. Weare attorn' suum, & protulit hic in cur' dict' dom' Reginae tunc ibid' quandam billam suam vers. Humf. Morley in custod' Marr' &c. de placito. Transgression' super casum, & sunt pleg. de prosequend', scil' Joh. Doo, & Ric. Roo; quæ quidem billa sequitur in hæc verba, ff. Devon' ff. Joh. Slade queritur de Humf. Morley in custod' Marr' Marefc' dom' Reginae coram ipsa Reg' existen', pro eo viz. quod cum præd' Joh. 10 die Novemb' anno regni dom' Elizabethæ nunc Reg' Angliæ 36. possession' fuisset pro termino diversor' annorum ad tunc & adhuc ventur', de & in uno clauso terr' cum pertin' in Halberton in comitatu præd' vocat' **Hack Parke**, continen' per estimationem 8 acras, & sic inde possession' existen', idem Johannes postea scilicet eodem 10 die Novemb' anno 36 supradicto, præd' cl'm cum tritico & filigine seminasset, quæ quidem triticum & filigo in clauso præd' per ipsum Joh. sic ut præf. seminat' postea scilicet 8 die Maii anno regni dictæ dom' Reginae nunc 37 super præd' clausum in bladis crescen' fuerunt, prædict' Humf. præd' 8 die Maii anno 37 suprad' præd' tritico & filigine in bladis super clauso præd' sic ut præf. tunc crescen' existen', apud Halberton præd' in consideratione quod idem Joh. ad tunc & ibidem ad specialem instantiam & requisitionem ipsius Humf. barganizasset & vendidisset præf. Humf. ad opus & usum ipsius Humf. propr', omnia blada tritici & filiginis quæ tunc crescebant super prædicto clauso vocat' **the Hack Parke**, (decimis inde Rector' Ecclesiæ de Halberton prædict' debet' tantummodo except' :) Super se assumpsit

& eidem Joh' ad tunc & ibid' fidelit' promisit, qd' ipse idem Humf. 16 l. legalis Monetæ Angliæ præf. Johanni in festo S. Joh' Baptistæ tunc proxim' sequent' bene & fidelit' solvere & contentare vellet: Prædictus tamen Humfrid' promission' & assumption' suas præd' minime curans, sed machin' & intendens ipsum Johann' de præd' 16 l. in hac parte callide & subdole decipere & defraudare prædict' 16 l. præf. Johanni juxta promissionem & assumptionem suas præd' nondum solvit, nec aliquam pro eidem contentavit, licet idem Humf. ad hoc postea, scilicet ultim' die Sept. anno regni dictæ dominæ Reginæ nunc 37 suprad', apud Halberton præd' per ipsum Joh' sæpius requisit' fuisset, sed ill' ei solvere seu contentare omnino recusavit & adhuc recusat, unde idem Johannes dic' qd' deterioratus est & dampnum habet ad valenc' 40 Marcarum, Et inde produc' sectam, &c. Et modo ad hunc diem, scil. ad diem Veneris prox. post Octab' S. Hill. isto eodem Termino, usque quem diem præd' Humf. habuit licenc' ad billam præd' interloquendi & tunc ad respondend', &c. coram dom' Regina apud Westm. ven' tam præd' Joh' per attorn' suum præd', quam præd' Humf. per Joh' Halstaff attorn' suum, & idem Humf. defendit vim & injuriam quando, &c. Et dic' qd' ipse non assumpsit super se mod' & forma prout præd' J. Slade superius vers. eum queritur, & de hoc pon' se super patriam; & præd' J. Slade similit' &c. ideo ven' inde Jur' coram dom' Regina apud West. die Jovis proxim' post Octab' Purificat' beatæ Mariæ, & qui nec &c. ad recogn' &c. Quia tam &c. Idem dies dat' est partib' præd' ibidem &c. Postea continuat' inde processu int' Partes præd' de placito præd' per jur' posit' inde inter eas in respect' coram dom' Reg' apud West. usque diem Mercurii proxim' post quinden' Pasch' extunc proxim' sequen', nisi Justic' dom' Reg' ad assisas in com' præd' capiend' assign' pri' die Lunæ in secunda septiman' quadragesim' apud Castrum Exon' in com' præd' per form' statut' &c. ven' pro defectu jur' &c. Ad quem diem Mercurii coram dom' Reg' apud West. præd' ven' partes præd' per attorn' suos præd', & præf. justic' ad Assisas cor' quib' &c. mis. hic record' suum cor' eis habit' in hæc verba. ff. Postea die & loco infracont', cor' Th. Walmesley uno justic' dom' Reg' de banco, & Edw. Fenner uno justic' dict' dom' Reg' ad placita cor' ipsa Reg' tenend' assign', justic' ejusdem dom' Reg' ad assisas in com' Devon' capiend' assign' per formam Statuti &c. ven' tam in'ranominatus Joh. Slade per Thomam Clayton attorn' suum, quam infracont' H. Morley per H. Collier attorn' suum, & jur' jurat' unde infra fit mentio exact' similiter ven', qui ad veritatem de infracont' dicend' elect', triat' & jurat', dicunt super sac' m' suum, qd' præd' H. M. emisset de præf. J. S. infracont' tritic' & filig'

in bladis super infrasc. clauso ut præf. crescen' existen' præf. 16 l. bonæ & legalis monetæ Angliæ, solvend' eidem J. Slade in festo S. Joh' Bapt. tunc prox' sequen', prout in narrat' infrasc' interius specificat': Et ulterius iidem jur' dicunt super sac'm suum præd', qd' inter eundem J. Slade & præf. Humf. Morley fuit nulla alia promissio & assumptio præter barganization' præd'; sed utrum super tota materia præd' per eosd' jur' in forma præd' comperta præd' H. Morley assumpsit super se modo & forma in narr' infrasc'. interius specificat' necne, iidem jur' penitus ignorant, & inde pet' advisamentum & considerationem Cur' hic &c. Et si super tota mater' præd' per ipsos jur' in forma præd' comperta, videbitur justic' & cur' hic, qd' præd' H. Morley assumpsit super se mod' & form' in narr' præd' interius specific', tunc iidem jur' dic' super sacramentum suum præd' qd' præd' H. Morley assumpsit super se mod' & forma prout præd' J. Slade interius vers. eum queritur & tunc assid' dampna ipsius J. Slade occasione non performanceis promissionis & assumptionis infrasc. ultra mis. & custag' sua per ipsum circa sect' suam in hac parte apposit' ad 16 l. & pro mis. & custag. ill' ad 20 s. Et si super tota mater' præd' per eosdem jur' in forma præd' comperta, videbitur eisdem justic' & cur' hic, qd' præd' H. Morley non assumpsit super se modo & forma in narr' præd' interius specific' tunc iidem jur' dic' super sacramentum suum qd' præd' Humf. non assumpsit super se modo & forma prout iidem Humf. interius allegavit: Et quia cur' dom' Reg' hic de judicio suo de & super præmissis reddendo nondum advisatur, dies inde dat' est partibus præd' in statu quo nunc cor' dom' Reg' apud West. usq; diem Lunæ proxim' post quindena S. Trin. de judicio suo de & super præmiss. audiend' eo qd' cur' dom' Reg' hic inde nondum &c. *Et sic de Termino in Terminum*, usq; diem Sabathi prox' post octab. S. Mich. de judicio suo de & super præmiss. audiendo, eo qd' cur' dom' Reg. hic nondum &c. Ad quem diem cor' dom' Reg' apud West. præd' ven' partes prædict' in propriis personis suis: Super quo vis. & per cur' dom' Reg' hic plenius intellectis omnibus & singulis præmiss. maturaq; deliberatione inde habita, pro eo qd' videt' cur' dict' dom' Reg. nunc hic qd' præd' Humf. assumpsit super se modo & forma in narr' præd' superius specific': Concess. est qd' præd' J. Slade recuperet versus prædict' H. Morley dampna & custag. sua præd' per jur' præd' in forma præd' assess. Necnon novem libr' pro mis. & custag' suis prædict' eidem Joh. Slade per cur' dict' dom' Reg. hic ex assensu suo de incr' adjudicat': Quæ quidem dampna in toto se attingunt ad vigint' & sex libr', & præd' Humfrid' Morley in misericordia &c.

Trin. 44 ELIZABETHÆ Regina.

SLADE's Case.

Yelv. 20. Moor
443. 667.

John Slade brought an Action on the Case in the King's Bench against *Humsfery Morley*, (which Plea began *Hill* 38 *Eliz. Rot.* 305.) and declared, that whereas the Pl. 10 *Nov.* 36 *Eliz.* was possessed of a Close of Land in *Halberton* in the County of *Devon* called *Rack Park*, containing by Estimation 8 Acres for the Term of divers Years then and yet to come, and so possessed, the Pl. the said 10 Day of *Nov.* the said Close had sowed with Wheat and Rie, which Wheat and Rie 8 *Maïi* 37 *Eliz.* were grown into Blades. The Defendant in Consideration that the Pl. at the special Instance and Request of the said *Humsfery* bargain'd and sold to him the said Blades and Wheat and Rie growing upon the said Close (the Tithes due to the Rector, &c. excepted) assumed and promised the Pl. to pay him 16 *l.* at the Feast of *St. John Baptist* then to come; and for Non-payment thereof at the said Feast of *St. John Baptist*, the Pl. brought the said Action; The Defendant pleaded *Non assumpsit modo & forma*; and on the Trial of this Issue the Jurors gave a special Verdict, *s.* That the Defendant bought of the Pl. the Wheat and Rie in Blades growing upon the said Close as is aforesaid, *prout* in the said Declaration is alledged, and further found, that between the Pl. and the Defendant there was no other Promise or Assumption but only the said Bargain: And against the Maintenance of this Action divers Objections were made by *John Doddridge* of Council with the Defendant. 1. That the Plaintiff upon this Bargain might have ordinary Remedy by Action of Debt which is an Action formed in the *Register*, and therefore he should not have an Action on the Case which is an extraordinary Action, and not limited within any certain Form in the *Register*; for *ubi cessat remedium ordinarium, ibi decurritur ad extraordinarium, & nunquam decurritur ad extraordinarium ubi valet ordinarium*, as appears by all our Books; *Et nullus debet agere actionem de dolo, ubi alia actio subest.* The second Objection was that the Maintenance

Hard. 65.

nance of this Action takes away the Defr's Benefit of (a) Wager of Law, and so bereaves him of the Benefit which the Law gives him, which is his Birthright. For peradventure the Def. has paid or satisfy'd the Pl. in private betwixt them, of which Payment or Satisfaction he has no Witness, and therefore it would be mischievous if he should not wage his Law in such Case. And that was the Reason (as 'twas said) that Debts by simple Contract shall not be (b) forfeited to the King by Outlawry or Attainder, because then by the King's Prerogative the Subject would be ousted of his Wager of Law, which is his Birthright, as it is held in 49 E. 3. 5. a. 50 Aff. 1. 16 E. 4. 4. b. & 9 Eliz. Dyer 262. and if the King shall lose the Forfeiture and the Debt in such Case, and the Debtor by Judgment of the Law shall be rather discharg'd of his Debt, before he shall be depriv'd of the Benefit which the Law gives him for his Discharge, altho' in Truth the Debt was due and payable; *a fortiori* in the Case at Bar, the Def. shall not be charg'd in an Action in which he shall be ousted of his Law when he may charge him in an Action, in which he may have the Benefit of it: And as to these Objections, the Courts of King's Bench and Common Pleas were divided; for the Justices of the King's Bench held that the Action (notwithstanding such Objections) was maintainable, and the Court of Common Pleas held the contrary. And for the Honour of the Law, and for the Quiet of the Subject in the appeasing of such Diversity of Opinions (*Quia nil in lege intolerabilius est eandem rem diverso jure censerit*) the Case was openly argu'd before all the Justices of England, and Barons of the Exchequer, *s.* Sir John Popham Knt. C. J. of England, Sir Edm. Anderson Knt. C. J. of the Common Pleas, Sir W. Periam Chief Baron of the Exchequer, Clark, Gawdy, Walmeley, Fenner, Kingmill, Savil, Warburton, and Yelverton in the Exchequer Chamber, by the Queen's Attorney-General for the Pl. and by John Doddridge for the Def. and at another Time the Case was argu'd at Serjeants Inn before all the said Justices and Barons by the Attorney General for the Pl. and by Fran. Bacon for the Def. and after many Conferences between the Justices and Barons, it was resolv'd, that the Action was maintainable, and that the Pl. should have Judgment. And in this Case these Points were resolv'd. 1. That altho' an Action of Debt lies upon the Contract, yet the Bargainor may have an Action on the Case or an Action of Debt at his Election, and that for three Reasons or Causes. 1. In Respect of infinite Presidents (which George Kemp, Esq; Secretary of the Prothonotaries of the King's Bench shew'd me) as well in the Court of Common Pleas as in the Court of King's Bench, in the Reigns of King H. 6. E. 4. H. 7. & H. 8. by which it appears, That the Plaintiffs declared that the Defendants in Consideration of a Sale to them of certain Goods, promised to pay so much Money, &c. in which

(a) Co. Lit. 295. a.

(b) Postea 95. a.
Moor 204, 206.
2 Rolls 806.
Cr. El. 203, 575.
851. 1 Rolls 912.
Stamf. Cor. 188. a.
Dyer 262. pl. 31.
Cr. Car. 187.
2 Vent. 282.
Hard 226.
Went. 23. Noy
155, 176. 1 Leo. 64.

(c) Yelv. 20.

Moor 433, 667.
Vaugh. 101.
2 Rolls Rep. 292.
464. 10 Co. 77. a.
3 Bullst. 237.
Cr. Car. 527, 540.
Cr. El. 454, 756.
1 Mod. Rep. 163.
Dy. 21. pl. 125.
2 Sid. 169.
Noy 59. Mo. 694.

Cases the Plaintiffs had Judgment. To which Presidents and Judgments being of so great Number, in so many Successions of Ages, and in the several Times of so many reverend Judges, the Justices in this Case gave great Regard: and so the Justices in ancient Times, and from Time to Time did; as well in Matters of Form as in deciding of Doubts and Questions as well at the Com. Law, as in Construction of Acts of Parliament, and therof. in 11 E. 3. Formed. 32. it is held, that the ancient Forms and Manner of Presidents are to be maintain'd and observ'd; and in 34 Ass. 7. that which has not been according to Usage shall not be permitted, and in 2 E. 3. 29. the ancient Form and Order is to be observ'd. In 39 H. 6. 30. the Opin. of *Prifor & tot' Cur'* was, that in a Writ of Mesn the Pl. ought to surmise the Tenure between the Lord paramount and the Mesn, as well as between the Mesn and the Tenant, and shew there divers Reasons and Causes of their Opinions, but when the Justices were inform'd by the Prothonotaries, that the Book call'd *Les Tales*, contain'd the Form that had always in such Cases been used, the Book saith, that the Justices resolv'd, that they would not change the Usage notwithstanding their Opinion was to the contrary, and according to the Presidents they awarded the Count good: 4 E. 4. 44. In a Writ of Error brought by *John Paston* to reverse an Outlawry against him, he did not surmise in the Writ at whose Suit he was outlaw'd, and all the Justices said it was a strange Writ, and no Certainty supposed thereby; for by the Writ it did not appear whether he was outlaw'd at the Suit of the Party, or at the K's Suit, or in what Suit, or for what Thing, and it might be that he was outlaw'd for Felony, Debt, Trespass, account or fine to the K. but when the Court was inform'd that the ancient Form was such, then they chang'd their Opinion and awarded the Writ good, and resolv'd, that common Course makes a Law; altho' now as 'twas there said, perhaps Reason willeth the contrary, but there the Justices said; We can't change the Law now, for that would be inconvenient, and therewith agrees *Long* 5 E. 4. 1. where it is said, that the Course of a Court makes a Law: *Vide* 2 & 3 *Phil. & Mar.* 120. The Statute of *W. 2. cap. 12. Quod Jusfic' coram quib' format' erit appellum & terminat'* shall enquire of Damages where the Def. is acquitted, yet Presidents expound the Law against the express Letter, *scilicet* that Justices of *Niffpri'* (before whom the Appeal was not began) shall do it, and many others to this Effect are in our Books; but forasmuch as Presidents are not always allowable, for in our Books the Judges reject some Presidents, see a notable Case in *Long* 5 E. 4. 110. for certain Rules and Differences in this Matter, there it is agreed, that where a Question was of a Return of an Assise, and 2 or 3 Presid. were shew'd, which agreed with the said Return, and the Justices said, that two or three Presidents do not make a Law; nor a Custom, especially when there are here in Court forty and more Presidents to the contrary; but if there was no President to the contrary, it was another Mat-

ter, unless the Court adjudge it against Reason, and then it shall be amended, for perhaps the (a) Presidents passed without (b) Challenge of the Party, or debate of the Justices, as then (as it is there recited) of late it was in a Writ of Error to reverse an Outlawry in the County of Lancaster, and the Error was because the Sheriff returned, that *ad Com' Lancastria tent' ibid' &c.* where it should be, *ad Com' Lancastria tent' apud Lancast'*, or other certain Place to which this Word *ibid'* shou'd have Relation, and altho' there were shewed 100 Presidents according to the said Return, yet the Outlawry was reversed; so that in divers Cases Presidents do not make a Law; and therefore it was said by the Justices to the Parties, that he who would have Advantage of Presidents ought to search for them at his Peril, and for his Speed, for the Court would not search for them; for if none, or no usual Presidents are shewn, the Court ought to adjudge according to Law and Reason: Out of which Book, 1. It is to be observed, that two or three or such small Number of Presidents do not make a Law against the Generality of Presidents in such Case. 2. That the Return of Sheriffs or Entries of Clerks without Challenge of the Party, or Consideration of the Court being against Common Law and Reason, are not allowable: But when the Presidents are (c) Judicial, *s.* where the Justices by divers Successions of Ages have given Judgment in Actions there brought, it shall be intended that some of the Council with the Defendant, or some of the Justices before whom the Action was tried, and the Record read, would have excepted against it, if in their Judgment the Action was not maintainable, but in Case of Return of an Outlawry, or Entries of Clerks, the Records pass in Silence, and without Exception of the Parties, and therefore are not so authentic as Judgments upon Demurrers or Verdicts, and therefore in such Cases, (d) *Multitudo errantium non parit errori patrocinium*, if such Returns or Entries of Clerks and Officers are clearly in the Opinion of the Justices against Law and Reason: So that in the Case at Bar it was resolved, that the Multitude of the said Judicial Presidents in so many Successions of Ages well prove that in the Case at Bar the Action was maintainable. The 2 Cause of their Resolution was divers Judgm. and Cases resolved in our Books where such Action on the Case on *Aff.* has been maintainable, when the Party might have had an Action of Debt, 21 *H. 6.* 55. *b.* 12 *E. 4.* 13. 13 *H. 7.* 26. 20 *H. 4.* *b.* & 20 *H. 7.* 8. *b.* which Case was adjudged as *Fitz. James* cites it, 22 *H. 8.* *Dyer* 22 *b.* 27 *H. 8.* 24 & 25. in *Tatam's Case*, *Norwood & Read's Case* adjudged *Pl' Com'* 180. 3. It was resolved, That every Contract (e) executory imports in itself an *Assumpsit*, for when one agrees to pay Mony, or to deliver any Thing, thereby he assumes and promises to pay, or deliver it, and therefore when one sells any Goods to another, and agrees to deliver them at a Day to come, and the other in Considerat.

(a) 2 Co. 61. b.
 6 Co. 52. b.
 1 Sid. 114. 1 And.
 49. 1 Jones 424.
 Vaugh. 419.
 Hard. 340.
 (b) Winch. 85.
 1 Rol. Rep. 75.
 Lit. Rep. 125.
 Hard. 98.

(c) Cr. Argum.
 75. 2 Rol. Rep.
 75. Hard. 98.
 355, 141.

(d) Cr. Argum.
 75. Hard. 98.

(e) Yelv. 56.
 Moor 667.

thereof agrees to pay so much Money at such a Day, in that Case both Parties may have an Action of Debt, or an Action on the Case on *Assumpsit*, for the mutual executory Agreement of both Parties imports in it self reciprocal Action upon the Case, as well as Action of Debt, and therewith agrees the Judgment in *Read & Norwood's Case*, *Pl. Com.* 128. 4. It was resolved, that the Pl. in this Action on the Case on *Assumpsit* shou'd not recover only Damages for the special Loss (if any be) which he had, but also for the whole Debt, so that a Recovery or Bar in this Action wou'd be a good * Bar in an Action of Debt brought upon the same Contract; so *via versa*, a Recovery or Bar in an Action of Debt is a good Bar in an Action on the Case on *Assumpsit*, *Vide* 12 E. 4. 13. a. 2 R. 3. 14. 33 H. 8. *Action sur le Case* Br. 105. 5. In some Cases it wou'd be mischief. if an Action of Debt shou'd be only brought, and not an Action on the Case, as in the Case *inter Redman & Peck*, 2 & 3 Ph. & Mar. Dyer 113. they bargain'd together that for a certain Consideration *Redman* shou'd deliver to *Peck* 20 Quarters of Barley yearly during his Life, and for Non-delivery in one Year it is adjudged that an Action well lies, or otherwise it wou'd be mischievous to *Peck*, for if he shou'd be driven to his Action of Debt, then he himself could never have it, but his Executors or Administrators, for Debt doth not lie in such Case till all the Days are incurred, and that wou'd be contrary to the Bargain and Intent of the Parties, for *Peck* provides it yearly for his necessary Use: So 5 Mar. Br. *Action sur le Case* 108. that if a Sum is given in Marriage to be paid at several Days, an Action upon the Case lies for Non-payment at the first Day, but no Action of Debt lies in such Case (a) till all the Days are past. Also it is good in these Days in as many Cases as may be done by the Law, to oust the Def. of his (a) Law, and to try it by the Country, for otherwise it wou'd be occasion of much Perjury. 6. It was said that an Action on the Case on *Assumpsit* is as well a formed Action and contained in the Register, as an Action of Debt, for there is its Form; Also it appears in divers other Cases in the Register, that an Action on the Case will lie, altho' the Pl. may have another formed Action in the Register, *F. N. B.* 94. g. & Register 103. b. If a Man has a Manor within any Honour, and has a Leet within his Manor of his Tenants, if he or his Tenants are distrained by the Lord of the Honour to come to the Leet of the Honour, he who is so distrained may have a general Writ of Trespafs, or a special Writ upon his Case: So if any Officer takes Toll of him who ought to be quit of Toll, he shall have a general Writ of Trespafs, or an Action upon his Case, as appears by *Fitz. ib.* 94. And if a Prior or other Prelate is riding in his Journey, and one distrains his Horse upon which

* Doct. pla. 67.

(a) 3 Co. 22. a.
 5 Co. 81. b. 8 Co.
 153. a. 10 Co.
 128. b. 2 Brownl.
 62. 63. Co. Lit.
 47. b. 292. b.
 F. N. B. 130.
 131. a. 131. h.
 Yelv. 67. 1 Leon.
 300, 319. 2 Leo.
 107, 108, 131.
 Moor 13. 3 Leon.
 4. 4 Leon. 13.
 Owen 40. Benl.
 in Ash. pl. 10.
 O. Benl. 3. pl. 8.
 N. Benl. 57. pl.
 93. Benl. in
 Kelw. 208, 209.
 Cro. El. 118,
 119, 776, 807.
 Cro. Jac. 505.
 Cro. Car. 421.
 1 Rol. 22, 401.
 1 Rol. Rep. 221.
 2 Rol. Rep. 47.
 Br. Action sur
 le Case 108. in
 nnc. 2 band. 337.
 Larch. 218.

he is riding when he may distrain other Goods, he may have a general Action of Trespass or an Action upon his Case, as appears in the *Register* 106. b. & *F. N. B.* 93. H. If the Sheriff suffers one in Execution upon a Statute Merchant to escape, the Conusee may have an Action of Debt, (a) or an Action on the Case, as appears by the *Register* 98. b. & *F. N. B.* 93. B. C. So if a Man ousts the Executors of his Lessee for Years of their Term, they may have a special Writ upon their Case, as appears *F. N. B.* 92 G. & *Register* 97. and yet they may have *Ejectione firma*, or Trespass. And therefore it was concluded that in all Cases when the Register has two Writs for one and the same Case, it is in the Party's Election to take either: But the *Register* has (b) two several Actions, *s.* Action upon the Case upon *Assumpsit*, and also an Action of Debt, and therefore the Party may elect either. And as to the Objection which has been made that it would be mischievous to the Def. that he should not (c) wage his Law, for as much as he might pay it in secret: To that it was answered, that it should be accounted his Folly that he did not take sufficient Witnesses with him to prove the Payment he made; But the Mischief would be rather on the other Party, for now Experience proves that Men's Consciences grow so large, that the Respect of their private Advantage rather induces Men (and chiefly those who have declining Estates) to Perjury; for *Jurare in propria causa* (as one saith) *est sepe numero hoc seculo precipitium diaboli ad destruendas miserorum animas ad infernum*: And therefore in Debt, or other Action where Wager of Law is admitted by the Law, the Judges without good Admonition and due Examination of the Party do not admit him to it. And as to the Case which was cited, that Debts or Duties due by single Contract where the Party may wage his Law shall not be (d) forfeited by Outlawry, because the Debtor will be thereby ousted of his Law; To that it was answered by the *Attorney-General*, that in such Case by the Law Debts or Duties shall be forfeited to the King, and so are the better Opinions of the Books, *s.* 3 *E. 3. Corone* 343. 19 *E. 2. Avowry* 223. If the Tenant of a Prior Alien is amerced for Default of Suit to the Court Baron, the K. seizes the Possessions of the Prior alien, he shall have this Debt due for the Amercement, yet in an Action of Debt brought for it by the Prior Alien, he shall have his (e) Law, as it was adjudged 6 *E. 6. in Serjeant Bendloe's Reports*, 28 *E. 3. 92. in Accompt, & Stamf. Pleas* of the Crown 188. and infinite Presidents in all Ages in the Exchequer, which I have seen, approve it, and so it was now lately resolved in the Exchequer, and so it was held in this Case by *Popham, Anderson*, and divers other Justices with whom I have conferred against the sudden Opinions in 49 *E. 3. 5. 50 Ass. 1. 16 E. 4. 4. & 9 Eliz. 262. (f) and so you have*

(a) Cro. Car.

310.

(b) Dyer 21. pl.

125.

(c) Co. Lit.

295. a. & Co.

85. b.

(d) 2 Vent. 282.

Moor 204, 206.

Antea 93. a.

2 Rol. 206. Cro.

El. 575, 851,

203. Cro. Car.

187. Stamf. Cor.

188. a. Dyer.

262. pl. 31.

Hard. 226.

Wentworth 23.

Noy 155, 176.

1 Leon. 64.

(e) O. Benl. 41.

Moor 276, 277.

1 Leon. 203, 204.

(f) Dyer 262.

pl. 31.

(a) 9 Co. 88. a.
Co. Lit. 295. a.
Br. Ley 102.
Godb. 291.
32 H. 6. 24. 2.

a Doubt in our Books well resolved. *Et nota* Reader, in every. (a) *Quo minus* in the Exchequer brought by the K's Debtor against one who is indebted to him on a simple Contract, the Defendant shall not have his Law, for the Benefit of the King, as appears in 8 H. 5. Ley 66. 20 E. 3. Ley 52. 10 H. 7. 6. and yet there the King is not Party, *a fortiori* when such Debt or Duty is forfeited to the King, and the King is the sole and immediate Party: *Et nota* Reader, this Resolution as to this Point agrees with the Judicial Law of God, upon which our Law is in this Point grounded, for it appears by the 22 Chapter of *Exodus ver. 7. Si quis commendaverit Amico pecuniam, &c. & vers. 10. Si quis commendaverit Proximo suo Asinum, Bovem, Ovem, & omne Jumentum ad Custodiam, & mortuum fuerit, aut debilitatum aut captum ab Hostibus, nullusque hoc viderit, Jusjurandum erit in medio qd' non extenderit manum ad Rem Proximi sui, suscipietque Dominus Juramentum & ille reddere non cogetur*; by which it appears that it is in the Election of the Plaintiff, either to charge the Defendant by Witnesses if he will and to oust him of his Law, or to refer it to the Defendant's Oath; for the Text saith, *Nullusque hoc viderit, s. if there be no Witnesses*, so by our Law in the same Case put in the Text, the Owner has Election either to bring an Action on the Case in which the Def. can't wage his Law, or an Action of Detinue in which he may, *Et jusjurandum in hoc casu est finis*: for the Plaintiff is bound thereby, and it is the End of the Controversy. And I am surpriz'd that in these Days so little Consideration is made of an Oath, as I daily observe; *Cum jurare per Deum altus religionis sit, quo Deus testis adhibetur tanquam is qui sit omnium rerum maximus, &c.* *Nota* Reader, for Witnesses or Acquittance.

Term.

Termino sancti Hillarii, Anno
ELIZABETHÆ Regina 40. Rot.
748.

ADAMS and LAMBERT's Case.

Memorandum qd' al's scilicet Termino sancti Michaelis ultimo præterito, coram domina Regina apud West. ven' The. Adams gener' per J. Povey attorn' suum, & protul' hic in cur' dictæ dom' Reg. tunc ibidem quand' billam suam vers. Joh. Lambert in custod' Mar' &c. de pl'ito transgr' & ejectionis firmæ; Et sunt pleg. de prosequend', scz. Jo. Doo, & R. Roo; Quæ quid' billa sequitur in hæc verba, ff. Buck. ff. T. Adams gen', querit' de J. Lamb. in custod' Marr' Marefc' dom' Reg. coram ipsa Reg. existen', pro eo viz. quod cum quidam R. Snelling gen' & T. Butler gen', 23. die Maii ann. regni dom. Eliz. Reg. nunc Ang. 36. apud villam Buck. in com. præd', dimississent & ad firmam tradidissent eid' Theoph. unum mesuag. & 10. acr' past' cum pertin' eid' mesuag. prox. adjacen', voc' **the Contigree**, scituat', jacen', & existen' in villa de Buck. præd' in com' præd'; Habend' eid' Theop. & assign' suis, a præd' 23. die Maii ann' 36. suprad', usque finem & term' 10. annor' extunc prox. sequen' & plenar' complend' & finiend'; virtute cuj' quid' dimission' idem Theo. postea, sc. 16. die April. an. regni dict' dom. Reg. nunc 39. in ten'ta præd' cum pert' intravit, & fuit inde possession', quousque præd' Jo. Lamb. postea, sc' eod' 16. die Apr. an. 39. suprad', vi & armis &c. in ten'ta præd' cum pertin' super possession' ipsi' Theo. inde intravit, & ips. The. a firma sua præd' inde term' suo præd' inde nond' finito ejecit, expulit, & amovit, ipsumque Theo. a possess. sua inde extratenuit, & adhuc extratenet, & alia enormia ei intulit cont' pac' dict' Dom' Reg' nunc ad dampnum ipsius The. 20. li. Et inde producit festam &c. Et modo ad hunc diem, scz. diem Lun. prox. post octab. S. Hill. isto eod' Term', usque quem diem præd' J. Lam. habuit licen' ad bill' præd' interloquen' & tunc

ADAMS and LAMBERT's Case. PART IV.

tunc ad respond' &c. coram dom' reg. apud West. venit tam præd' T. Adams per attorn' suum præd', quam præd' J. Lam. per J. Harborne attorn' suum, & idem J. Lambert defend' vim & injur' quando, &c. Et dicit quod ipse non est inde culpabil', & de hoc pon' se super Patriam; Et præd' The. fil'iter, &c. Ideo ven' inde Jur' coram dom. reg. apud West. die Lun. prox. post crastin. Purification' beatæ Mariæ, per quos &c. Et qui nec &c. ad recognoscend' &c. Quia tam &c. Idem dies dat' est partibus præd' ibidem &c. De quo die Jur' præd' inter partes præd' de placito præd' posit' fuit in respect' coram dom. reg. apud West. usque diem Lunæ prox. post mensem Pasc. anno regni dictæ dom' reg. nunc 41. pro defectu Jur' &c. Ad quem diem coram eadem dom. reg. apud West. ven' partes præd' per attorn' suos præd', Et Jur' jurat' illius exact' similiter ven', qui ad veritatem de præmissis dicend' electi, triati, & jurati, dicunt super sacramentum suum, quod diu ante præd' tempus transgressionis & ejectionis præd', scz. 5. die Mensis Junii anno dom. millesimo quadringentesimo tricesimo primo, annoque regni reg. H. 6. post conquest' Angl' nono, quidam Jo. Barton senfuit seifitus de præd' mesuag. ac de 6. acris pasturæ parcell' præd' 10. acrar' pasturæ in narratione præd' specificat', in quibus supponit' transgress. & ejectionem præd' fieri inter alia in dominico suo ut de feodo, & sic inde seifit' existen' de mesuag. præd' & præd' sex acris pasturæ cum pertinen' parcell' &c. feoffavit W. Brampton; Habendum & tenendum sibi & hæredibus suis, ad opus & usum præf. J. Barton senioris & hæred' suor' : virtute cuj' præf. W. Brampton fuit seifit' de mess. & 6. acris pasturæ præd' parc' &c. cum pertinentiis in dominico suo ut de feodo, ad usum præf. J. Bart. & hæred' suor', præfatorq; W. Brampt. sic inde seifit' existen', præd' J. Bart. postea, scz. dict' 5 die mensis Junii, anno dom. millesimo quadringentesimo tricesimo primo, dictoque anno regni dicti nuper reg. H. 6. nono supra, apud Buck. præd' condidit Testament' & ultim' voluntat' suam infrasc. de dict' mess. & præd' 6. acris pasturæ parcell' &c. inter alia in hæc verba &c. *In Dei nomine, Amen.* ff. 5. die mensis Junii, anno dom. millesimo quadringentesimo tricesimo primo, regni vero reg. H. 6. post conquestum Angliæ nono; Ego Johan. Barton senior compos mentis & sanæ memoriæ existens, condo, facio, & ordino præfens Testament' meum indentat' ultimam meam continens voluntat' in hunc modum. *Imprimis*, lego & recommend' animam meam Deo & omnipotenti creatori & salvatori meo beatæque Mariæ virg. matri ejus, & omnibus Sanctis, corpusque meum ad sepeliend' in ecclesia beati Petri apost. de Buck. ff. in ecclesia S. Romwoldi, eod' loco quo petram marmoream pro mea sepultura ordinavi & constitui, & pro hac sepultura mea ibid' habend', ego fabricæ corporis dictæ

dictæ Ecclesiæ 40 s. Item volo & ordino, quod festinanter post obitum meum celebrentur pro anima mea 4000 missæ, pro quibus celebrand' lego 16 li. 13 s. 4 d. Et pro labore ipsius qui se circa hoc occupaverit, ut plene fidelit' & festinant' perimpleat', 6 s. 8 d. Item lego viris religiosis subscriptis, ut ipsi quam cito per executores meos seu eorum deputat' de obitu meo præmoneant', tam festinanter quo commode fieri poterit, quilibet ordo eorum dicat *Placebo & Dirige per notam, & die sequen' missam de requiem* cum nota pro anima mea, animabus patris mei & matris meæ, amicorum & benefactorum meorum, & animabus omnium fidelium defunct', viz. Magistro & confratribus domus & Ecclesiæ sanctæ Thom. Martiris Cantuar' dict' de Acon' London 40 s. Magistro & confratribus hospital' sc'i Barth. in West Smithfield London 40 s. Abbati & conventui de Betselden in com. Buck. 100 s. Priori & conventui de Luffield 40 s. Priori & conventui de Chetwood 40 s. Priori & conventui de Snelsale 20 s. Cuilibet ordini quatuor ordinum fratrum mendican' in villa Northt' 20 s. cuilibet ordini quatuor ordin' frat' mendican' in villa Oxon' 20 s. conventui fratrum minor' de Aylesbury 20 s. cuil't ordini quinque ordin' fratrum in civit' Lond' 20 s. Item lego fratri Joh. Upton 100 s. ut ipse pro anima mea celebret per unum ann' integrum prox. post obitum meum. Et volo qd omnes religiosi præd' per executores meos aut eorum deputat' onerentur, qd pro anima mea specialit' orent. Item do & lego Jo. Barton junior' fratri meo omnia Tenementa mea, simul cum omnibus tenementis quæ quondam fuerunt Rog. Skiret quæ perquisivit, cum reddit', & serviciis, una cum reversionibus & omnibus suis pertinentiis in villa de Buck. in com' Buck. Habendum & tenendum omnia tenem' præd' cum pertinen' præf. Joh. fratri meo ad terminum vitæ suæ, sub conditionibus subsequen' viz. Quod idem Johan. frater meus durant' vita sua, inveniatur unum Capellanum idoneum & honestum pro anima mea, animabus patris mei, matris meæ, fratrum, fororum, benefactorum, & amicorum meor', & omnium fidelium defunctorum, ad altare Sancti Jacobi in præd' Ecclesia beati Petri quotidie celebratur'. Et volo & ordino qd' prædict' Capellanus singulis diebus festivalibus intersit matutinis & vespers in Choro Ecclesiæ præd': Ac volo & ordino qd' dict' Capellanus omni die infra Ecclesiam prædict' dicat Matutinas de sanct' Maria, & sequentur Matutinas de die cum cæteris horis canonicis, & illis sic finitis, dicat ipse Capellanus qualibet die antequam ierit ad missam, unam portion' de Psalter' Davitico; Ita semper qd' a dict' Capell', qualibet sept' dicat' unum integr' Psalterium Daviticum, & postmod' quotidie cum infirmis non gravetur transeat ad missam, qua missa finita antequam recedat ab Altare

ADAMS & LAMBERT's Case. PART IV.

tare dicat Psalm' *De profundis* cum oratione *Inclina*: Et quotidie post prand' quando sibi melius videbitur expedire, dicat ipse Capellan' infra dict' Eccles. beati Petri *Placebo & Dirige*, cum novem lectionibus, tempore Paschal' except', quo vero tempor. Paschali dicat ipse *Officium mortuor'*, cum 3. lectionibus secund' usum Sarum; & subsequenter' omni die h'm'di tempore Paschali *Psalterium beatae Mar' virgin'*, sequenturque commendationes Animar' cum oratione *Tibi dom' commendamus*: Postea vero dicat ipse *vesperas de die*, sequenturque *vesperas de sancta Mar'*: Et quod ipse Capellan' infirmitat' minime impeditus, quolibet die quo defecerit in Missa sua in dict' Ecclesia S. Pe. dicend', det & erogat uni pauperi de vill' de Buck. prae'd' 1 d. Volo insuper quod dict' Capell' moram continuam faciat ibid', habeat tamen ipse Capellan' quolibet anno recreationem per spacium 15 dierum: Ita semper qd' ipse Capell' per un' alium capell' vices suas suppleri fecerit, aut quolibet die illarum 15 dier' det uni pauperi de villa de Buck. 1 d. Et volo quod prae'd' Jo. frater meus annuat' durante vita sua persolvat dicto Capell' in prae'd' Ecclesia beati Pet', pro sua sustentatione & h'm'di suis laboribus ut praefert' exercend' & perficiend' 10 Marcas bonae & legalis Monetae Angliae, de exit' & provent' tent' prae'd' cum pertin': Ita semper qd' idem Capell' hujusmodi summa 10 Marcas pro suo salario sive stipend' se reputet content', a nullo alio aliquod stipend' recipiend', aut percipiend'. Et volo & ordino ego Jo. Barton sen' Testator antedict', qd' dictus Capellan' & successores sui ad officium & servic' supradict. elegantur, ordinent', perficiantur, admittant', & recipiantur, per Magist. & confratres domus sive Ecclesiae S. Tho. Martir' Cantuar' dict' de Acon' Lond. suprad', & success. suos imperpet': Et etiam si minus bene vel inhoneste se gerant, & habeant, aut si onera praed' facere & perimplere neglexerint vel recusaverint, per eosd. Magist. & confratres & eorum success. sive per eorum sufficient' deputat', a dicto officio sive servicio amoveantur, & expell', seu saltem is eorum qui culpabil' in praemissis reperitur amoveatur & expellat', & alius Capell. idoneus loco ipsius Capell' sic propt' suos defect' amoti, expulsi, sive per mort' deceden', aut aliter qualitercunque ab h'm'di officio sive servicio cessant' sive recedent', per praef. Mag. & confratres domus sive Eccles. S. Thomae praed' & success. suos elegatur, ordinetur, praeficiat', admittatur, & recipiatur: Ita quod dn's Episc. Lincoln' qui pro tempore fuerit, aut Archidiacon' loci, seu Praebend' praebendae de Buck. seu aliquis alius eorum nomine, super electione, ordinatione, praefactione, admissione, & receptione, vel amotione dicti capell', nullam jurisdictionem aut potestatem habeant aut vindicent in futurum quoquo modo: Ideo provideant dicti Magist' & confratres, &

eorum

eorum success. sub animarum suar' periculo, & sicut coram summo Iudice respondere voluerunt, qd' nec favore, amore, prece, vel pretio, aliquem Capellan' ad prædict' officium sive servitium ordinent, admittent, seu recipient, nisi honestam & probatam personam in quantum ejus conversatio sibi præstare poterit; Et qd' dictus Capellan' ad hujusmodi officium sive servitium admittend' in prima sua admissione præf. Magistro & Confratribus domus & Eccl'ie sancti Tho. præd', ac eorum successor', tact' sacrosanctis Evangeliiis, juramentum præstet corporale ad omnia & singula onera prædict' sine fraude & dolo, aut aliqua dispensatione super eisdem in contrarium impetrand' modo & forma superius declarat' bene & fidelit' faciend' & perimplend', in quantum fragilitas permittat humana: Et qd' quilibet Capell' ad dict' officium sive servitium admittend', in sua prima admissione inveniatur & faciat Magistro & confratribus domus & Eccl'ie sancti Thomæ Martir' Cantuar' dict' de Acon' London' supradict' pro tempor' existen', sufficien' securitat' pro ornamento dicti altaris sc'i Jacobi pertinen' salvo & secure custodiend', ac in suis recess. sive cess. sursum reddend', & deliberand'. Et insuper qd' dict' Joh. frater meus durante vita sua, inveniatur in villa prædict' sex pauperes homines sive fæminas ad orand', pro anima mea & animabus suprad' singulis diebus imperpetuum; Et quod det qualibet septimana durante vita sua cuilibet ipsorum pauperum quatuor denarios, & etiam cuilibet eorum mansionem prout (Deo disponente) pro eis constitui & ordinari. Ac etiam qd' idem Johannes frater meus, tota vita sua inveniatur unum lampad' ardentem singulis diebus & noctibus, coram Sancto Romwaldo in Ecclesia beati Petri antedicti, prout modo inventus est & sustentatus. Et qd' idem Jo. frater meus durante vita sua, teneat seu tenere faciat anniversar' meum, patris mei, & matris meæ, annuat' in die translationis sancti Benedicti in Ecclesia beati Petri antedict', in quo quidem anniversario inveniatur idem Johannes frater meus annuat' duos cereos nocte ad *Dirige*, & die sequen' ad *miss.* unum scilicet ad caput & alterum ad pedes sepulturæ meæ ardentem, quolibet cereo ponderan' tres libras; Quibus exequiis meis completis, volo quod totum id quod de dictis cereis resid' fuerit, dimittatur & remaneat Altari sancti Jacobi præd' super candelabr' ibidem existen' Capell' Cantariæ meæ supradict', singulis diebus festivis, ad missam quamdiu durare poterit deservitur; Et quod prædictus Johannes frater meus tota vita sua durante, inveniatur annuatim unum torcherum competen' ad altare prædictum deservitur: Et volo quod omnia præd' tenementa, reddit', & servicia, cum reversionibus & omnibus suis pertinentiis post Mortem dicti Johannis fratris mei, integre remaneant Margaretae & Isabella:

ADAMS & LAMBERT's Case. PART IV.

bellæ sororibus meis, ad totum terminum vitarum ear', & earum alterius diutius viven'; Tenend' de capitalibus dominis feod' illius per servicia inde debet' & de jure consuet', sub conditione quod eadem Margareta & Isabella ear' vita duran', faciant perimpleant & observent omnia & singula onera superius limitat' in forma præd': Et post mort' præd' Margareta & Isabellæ, volo quod omnia prædicta ten' reddat' & servicia, cum reversionibus & omnibus suis pertinentiis, integre reman' Willihel. Fowler; Tenend' sibi & hæredibus suis de corpore suo legitime procreatis, de capitalibus dominis Feod' illius per servicia inde debet' & de jure consuet'; Sub conditione qd' ipse Willihel. & hæred' sui prædicti, faciant perimpleant & observent omnia & singula onera suprascripta in forma antedicta imperpetuum. Et si contingat prædict' Willihelimum Fowler sine hæred' de corpore suo legitime procreat' obire, quod extunc omnia prædict' tenementa reddat' servicia cum reversionibus & omnibus suis pertinentiis, integre reman' Johanni Somerton consanguin' meo, & hæredibus suis de corpore suo legitime exeun'; Tenend' de capitalibus dominis Feodi illius per servicia inde debet' & de jure consuet'; Sub conditione quod ipse Johannes Somerton & hæred' sui, omnia & singula onera suprascripta in forma prædict' perimpleant & observent imperpetuum; Et si ipsum Johannem Somerton absque hæred' de corpore suo legitime exeunt' obire contingerit, qd' extunc omnia prædicta tenementa reddat' & servicia cum reversionibus & omnibus suis pertinentiis, integre remaneant Willihel' Purfrey consanguin' meo & hæred' suis de corpore suo legitime exeun': Tenend' de capitalibus dominis Feod' illius per servic' inde debet' & de jure consuet': Sub conditione quod idem Willihel' Purfrey & hæred' sui prædicti faciant perimpleant & observent omnia & singula onera supradict' in forma antedict' imperpetuum. Et si contingat prædict' Willihel. Purfrey obire sine hæred' de corpore suo legitime exeun', extunc do & lego ac volo, quod omnia prædict' tenementa reddat' & servic' cum Revers. ac omnibus suis pertinentiis, integre reman' Magistro domus Sancti Thom' Martiris de Acon' London supradicti: Habend' & tenend' sibi & successor' suis Magistris illius domus sancti Tho. ad termin' & finem quadraginta annorum extunc prox. sequen', & plenarie complend'. Et post termin' prædict' finit', quod omnia tenementa præd' reddat' & servic' cum reversionibus & omnibus suis pertin', reman' Magistro hospitalis S. Barth. in Westsmithfield London supradicti: Habendum & tenendum eidem Magistro & successoribus suis Magistris dicti hospitalis S. Barth. ad terminum & finem quadraginta annorum extunc prox. sequen', & plenar' complend'; Cuilibet eorum

eorum sub conditione subsequen', viz. quod quilibet ipsoꝝ magist' & successor' suorum durant' eorum termin', faciat & perimpleat omnia & singula onera supralimit' in forma suprad': Et si contingat præd' Joh. fratrem meum durant' vita sua in perficiend' onera præd' deficere, seu illa non perimplere, aut omnia præd' ten'ta durante vita sua non competenter sustentare, & reparare, seu ea aut aliquam parcell' eorundem alienare, sive ad parvum valorem ea dimittere, in præjudicium cæterarum personar' in remaner' suprad', nominat; Qd' extunc bene liceat præf. Margar. & Isab. in prædict' ten't, reddit', & servic', cum reversionibus & o'ibus suis pertin' intrare, & ea retinere ut in remanere suum præd' absque contradictione alicujus; Et quod extunc status præd' Joh. fratris mei omnino cesset, & nullius sit valoris: Et si contingat præd' Margar. & Isab. durante vita earum in perficiend' & perimplend' o'ia oner' præd' deficere, aut ill' non perimplere, seu omnia tenementa præd' duran' earum vita competenter non sustentare & reparare, sive illa alienare vel dimittere ut supradict' est, aut negligentes sint ad intrand' si causa ut supradict' est evener', quod extunc bene licebit antedict' Willihelm' Fowler & hæred' suis præd', in omnia supradict' ten'ta, reddit' & servic' cum reversionibus & o'ibus suis pertin' intrare ut in remaner' suum prædict', & illa retinere absque contradictione aliquali: Et quod extunc status prædict' Margar. & Isabell. ut præd' est omnino cesset, & nullius sit valoris; Et si præd' Will. Fowler aut hæred' sui præd' in faciend' & perficiend' omnia & singula onera præd' deficere, seu non perimplere, aut omnia præd' ten'ta competenter non sustentaver' & reparaver', vel ill' alienaver' seu dimisser' ut præfert', sive negligentes sint ad intrand' si causa ut præmittitur evener'; Qd' extunc bene licet suprad' Joh. Summerton & hæred' suis supradict' in omnia præd' ten'ta, redd', & servic', cum reversionibus & omnibus suis pertin' intrare ut in remaner' suum præd' & ill' retiner' absque contradict' aliquali, Et qd' extunc status præd' W. Fow. & hæred' suor' præd' ut præf. cesset, & nullius sit valoris; Et si contingat præd' J. Summerton aut hæred' suos præd' in faciend' & perficiend' omnia & singula onera præd' deficere seu ea non perimplere, sive omnia præd' ten'ta non competent' sustentare & reparare, vel ill' alienare sive dimittere ut suprad' est, vel negligentes sint ad intrand' si causa ut supradict' est evener'; Quid extunc bene licebit anted' W. Purf. & hæred' suis prædict', in omnia ten'ta præd' redd' & servic' cum reversionibus & omnibus suis pertin' intrare, ut in reman' suum præd', & ill' retin' absque contrad' aliquali; Et quod extunc stat' præd' Joh. Summerton & hæredum suorum præd' in omnibus tenementis prædict' omnino cesset, & nullius sit valor': Et si conting' præd' W. Purfrey & hæred' suos præd' in perfic' o'ia & sing' onera præd' deficere, seu ea non perimpl', aut o'ia præd' ten'ta non competenter

ADAMS & LAMBERT's Case. PART IV.

sustentare & reparare, vel illa alienare sive demittere ut suprad' est aut negligentes sint ad intrand' si causa ut præferatur evenerit; Quod tunc status ipsius W. Purfrey & hæred' suorum omnino cesset, & nullius sit valoris; Et quod tunc bene licebit præf. Magistro domus sancti Martiris de Acon' London & confratribus ejusdem domus ac eorum successor', in omnia prædict' ten'ta redd' & servic' cum reversionibus & omnibus suis pertin' intrare, ut in reman' suum term' sui præd'; Tenend' in forma antedict': Et si contingat præd' Magistrum & confratres domus S. Thomæ præd' seu successores suos præd', in faciend' & perficiend' omnia & singula onera superius specificat' deficere, seu ea non perimplere, aut omnia ten'ta præd' ut supradict' est non competenter sustentare & reparare, vel negligentes sint ad intrand' si causa evenerit ut præd' est, quod extunc bene licebit Magistr' hospitalis S. Barth. suprad. & confratribus ejusdem hospitalis ac eorum successor', in omnia prædict' ten'ta reddit' & servic' cum reversionibus & omnibus suis pertin' intrar' ut in remaner' suum termini sui præd', & extunc cesset status dicti Magistri domus S. Thomæ suprad': Et si contingat præd' Magistrum & confratres hospitalis S. Barth. præd', in faciend' & perficiend' omnia & singula onera superius declarat' deficere, seu ea non perimplere, aut omnia ten'ta suprad' non competenter sustentare & reparare, quod extunc bene licebit rectis hæred' meis in omnia prædict' ten'ta, redd', & servic', cum reversionibus & omnibus suis pertin' intrare, & illa retinere, absque contradictione quacunque imperpetuum; Supportando omnia onera præd' ut suprad' est, prout voluerint pro me & se coram summo Judice respondere. Et quia hæc mea volunt' pro bona animar' patris & matris meor', anima etiam mea, animabusque fratror' parent' & benefactor' nostror' edita fuit & ordinata, precor & oner' præd' Joh. fratrem meum, prout pro me & se voluerit respondere, quod ipsa tota vita sua diligent' supervideat gubernation' Cantariæ suprad', & qd' omnia onera præscripta & in hac mea ultima volunt' declar' inviolabil' perimpleant' & conservent': Et quod notitiam faciat omnibus hijs qui in remaner' præd' statum habebunt in dict' ten't', redd', & servic' cum reversionibus & omnibus suis pertin', ut ipsi cognoscant tenor' & effectum testament' et ultimæ meæ volunt': Et volo quod Feoffati mei de ten't' cum suis pert' quod mei pauperes homines modo inhabitant, pro eo qd' non est divisibile, faciant tal' statum post mortem meam omnibus illis supranominat', prout habent ex meo legato de & in tenementis in Buck. præd', ad usum prædict' pauperum ibidem habitantium, supportand' reparation' illius ten'ti prædict' pauperum quociens indiger': Et quia dubito ne tenementa supradict' sufficiant ad supportand' omnia suprad' onera causa grandis cultus reparac' eorundem, volo quod Feoffat' mei statim post mortem meam faciant

talem statum omnibus illis supranominatis, de omnibus illis terr' & ten'tis meis in villis de Bourton, Moreton, Gavescote, cum prebend' Lenburgh, Thorneborough, Hillefsden, Waterstradford, Shaldeston, & Foycote in com. Buck. ac de omnibus illis terr' cum pert' in campis de Buck. necnon de omnibus terris & ten'tis meis in Worton in com. Oxon. ac de uno ten'to meo in villa Oxon. in quibus Feoffat' extiterunt, prout habent ex meo legato de & in ten'tis de Buck. præd' Ita qd' sufficienter omnia onera præd' possint sustentare & etiam pro labore inde rationabilit' percipere & obtinere: Item volo quod execut' mei aut aliquis eorum juxta eorum assignation' in die Parasceves prox. post obit' meum contingen', faciant ipsi. qui ad crucem in cœmiterio Eccl'ie Cathedralis S. Pauli Lond' prædicabit, animam meam precibus populi ibid' congregat' recommendare, pro qua recommendatione (& ut pro anima mea deprecet) volo qd' ipse prædicator habeat xl d. Item volo qd' tres prædicatores qui in cœmit' novi Hospitalis beatæ Mariæ extra Bishopsgate Lond. tribus diebus in septimana Pasc. prox. post obitum meum prædicabunt, animam meam piis precibus populi ibid' congregat' special' recommendant, & habeant quilibet ipsorum trium prædicat' pro hujusmodi animæ meæ recommendat', & ut ipsi pro anima mea exorent, xl d. Et volo quod Execut' mei durante uno anno integro prox. post decessum meum omni die dominica faciant prædicat', ad crucem in cœmiterio Eccl'ie Cathedralis S. Pauli suprad' prædicantes, animam meam precibus populi ibid' congregat' special' recommendare, pro qua quid' recommendat' habeat hujusmodi prædicat' iv d. Item lego domino Rob. Forset Capellano meo de Lond' x li. ut ipse dn's Rob. pro anima mea special' celebret & deprec' per 8 annos prox. post decess. meum sequen', capiend' ff. annuat' pro suo salario C. s. si tam diu vixerit: Et si inf. dict' term' 8. annor' obierit, quod tunc dict' Resid' qd' ind' remans. pro anima mea & anima ipsi. dn'i R. in piis usibus distribuat, & distribui fac'. Item lego Mar. forori meæ C. s. & unum ciphum argent' cum cooperulo eid' pert'. Item lego Isab. forori meæ C. s. & unum ciphum arg. cum cooper' eid' pert', ut ipsi. M. & J. pro anima mea exorent: & ad istud testam' meum meam ultimam continens. volunt' bene & fidel' exequend' & perimplend', ac inviolab' perficiend' ordino & constit' meos exec' J. Bart' frat' meum, & Al. Sprot civem & pannar' Lond', ac dict' dn'm R. Forset Cappell' meum, & eor' supervis. præsent' testamenti mei ordino & constituo Johannem Waking Magistrum hospitalis Sancti Barton supradicti: Quibus vero Exec' & supervis. super' nominat', lego resid' omnium & singulor' bonor' meor' & cattal' quod remans' per me minime distribut', disposut', nec legat' in mea ult' volunt', fidel' & indil' distrib', pro anima mea, vol' q' ipsi execut' & supervis. juxta eorum san-

ADAMS & LAMBERT's Case. PART IV.

discretionem & conscientiam, de bonis meis pro suo labore rationabiliter percipiant. Et qd' præfens testament' meum & mea ultima voluntas præscript', adeo festinanter quo commode fieri poterit per ipsos perimpleat' & exequetur, prout in die metuenda ultimi judicii, pro me & seipsis coram summo Judice in nihil ignoratur voluerint respondere. In cujus rei testimonium huic præfenti testamento meo indentato ultimam meam continenti volunt' sigillum meum apposui: Dat' die & anno suprad'. Et dicunt ulterius juratores præfui super sac'm suum præd', qd' præd' W. Brampton de dict' mess. & sex acris pasturæ parcell' &c. inter alia sic ut (præfert') seisit' existen', præd' J. Barton senior postea ap' Buck. præd' obiit. Post cujus quidem J. Barton senioris mortem, præd' W. Brampton fuit seisit' de mess. prædict' & sex acris pasturæ præd' parcell' &c. in dominico suo ut de feodo, ad sepeales usus & intentiones in præd' ultima volunt' præf. J. Barton testatoris superius express'. Quodque præd' J. Barton junior post mortem præd' J. Barton testatoris in præd' mess. & sex acras pasturæ cum pertinentiis parcell' &c. intravit, ac reddit' & proficua inde annuatim post mortem præd' J. Barton testatoris provenien', pro & durante vita ipsius Joh. junior' percepit & habuit, ac eadem ad usus, intentiones, & appunctuac. in eisdem testamento & ultim' voluntat' inde limitat' & appunctuat. durante vita ejusdem Joh. junioris convertēbat, applicavit, & persolvit: Et postea & ante pd' tempus quo &c. idem Jo. Barton junior apud Buck. præd' obiit, post cujus quidem J. Barton junioris mortem, præd' Will. Brampton fuit seisit' de dicto mess. & sex acris pasturæ præd' parcell' &c. cum pertinen' in dominico suo ut de feodo, ad usus. & intentiones in præd' ultima voluntat' præd' Jo. Barton testatoris superius express'. perimplend'; Quodque præd' Margareta & Isabella post mortem præd' J. Barton Junioris in præd' mess. & sex acras pasturæ parcell' &c. cum pertinentiis intraverunt, ac reddit' & proficua inde annuatim post mortem præd' Joh. Barton junioris proven', pro & durant' vitis ipsarum Margareta & Isabellæ, & earum alterius diutius viven' perceperunt & habuerunt, ac eadem ad usus, intentiones, & appunctuationes in eisd' testamento & ultima voluntate præd' Joh. Barton testatoris declarat', limitat', & appunctuat. durant' vitis earund' Margareta & Isabellæ applicaverunt, convertērun't, & persolverunt, ac earum altera diutius viven' & applicavit, convertit, & persolvit: Ac postea & ante præd' tempus quo &c. præd' Margareta & Isabella apud Buck. præd' obierunt, post quarum quidem Margareta & Isabellæ mortem, prædict' Will. Brampton fuit seisit' in dominico suo ut de feodo, de & in dict' mess. & sex acris pasturæ præd' parcell' &c. cum pert' ad usus & intentiones in præd' ultima voluntate præd' Joh. Barton senioris

senioris Testatoris express. perimplend': Quodque prædict' Will. Fowler in testamen' præd' nominatus, habuit exitum de corpore suo legitime procreat' quendam Ri. Fowler, ac idem Will. Fow. post mortem prædictar' Margaretæ & Isabellæ in præd' mess. & sex acras pastur' parcell' &c. cum pert' intravit, ac reddit' & proficua inde annuatim post mortem præd' Mar. & Isabellæ provenien', pro & duran' vita ipsius W. Fow. percepit & habuit, ac eadem ad usus intentiones & appunetuaciones in eisdem testament' & ultima voluntat' præd' Joh. Barton senioris testator' express. duran' vita ipsius W. Fow. applicavit convertebat & persolvebat; Et postea sexto die Julii ann' regni regis Henr' sexti tricesimo, idem W. Fow. apud Buck. præd' obiit, post cujus quidem W. Fow. mortem præfat' W. Brampton fuit seiscitus de & in dicto messuag' & sex acris pastur' præd' parcell' &c. cum pertin' in dn'ico suo ut de feodo, ad usus & intentiones in præd' ultima voluntat' præd' J. Barton senioris superius express. perimplend'; Quodque præd' Ri. Fow. habuit exitum de corpore suo legitime procreat' quendam Ed. Fow. ac idem Ri. Fow. post mortem præd' W. Fow. in præd' messuag' & sex acris pastur' parcell' &c. cum pertin' intravit, ac reddit' & proficua inde annuatim post mortem præd' W. Fow. provenien', pro & durante vita ipsius Ri. Fow. percepit & habuit, ac eadem ad usus intentiones & apunetuaciones in eisdem Testament' & ultima voluntat' præfat' J. Bar. senioris testatoris express. duran' vita ipsius Ri. Fow. applicuit convertebat & persolvebat, scilicet usque tertium diem Novembris anno regni regis Ed. quarti post Conquest' Angliæ septim', quo quidem tertio die Novembr' præd' Ri. Fow. apud Buck. præd' obiit, post cujus quidem Ri. mortem præd' Will. Bramp. fuit de messuag' & sex acris pastur' præd' parcell' &c. cum pertinen' seiscit' in dn'ico suo ut de feodo ad usus & intentiones in testament' præfat' J. Barton testatoris limitat' & declarat' perimplend': Quodque præd' Ed. Fow. habuit exitum de corpore suo legit' procreat' quendam Gabriel' Fow. ac idem Ed. post mortem præd' Ri. Fow. in præd' mess. & sex acras pastur' parcell' &c. cum pertin' intravit, ac reddit' & proficua inde annuatim post mortem præd' Ri. Fow. provenien', pro & durante vita ipsius Ed. præcepit & habuit, ac eadem ad usus intentiones & appunetuatuat' in eisdem testament' & ultima voluntate declarat' & limitat', usque in quartum diem Februar' an. regni Regis H. 8. vicesimo septim' applicuit convertebat & persolvebat: Quo quidem 4 die Feb' virtute cujusd' actus in Parl. ap. West' in com' Mid' pro usibus in poss. transfer' ad tunc tent' edit', præd' Ed. Fow. fuit seiscit' de & in præd' mess. & 6 acris pastur' parcell' &c. cum pertin' dn'ico suo ut de feodo taliato;

Et

ADAMS & LAMBERT's Case. PART IV.

Et sic inde seisit' existens exitus & proficua inde tota vita sua percepit & habuit, ac eadem ad usus & intentiones in testamenti præd' Jo. Barton senioris testatoris superius express. applicavit, & expendidit; Quodque præd' Ed. sic inde seisitus existens postea scz. xxviii die Maii anno regni præd' nuper regis H. 8. tricesim' secund', apud Buck. præd' de tali statu suo obiit inde sic seisitus, post cujus quidem Edwardi Fowler mortem præd' mess. & sex acra pastur' parcell' &c. descendebant præf. Gabrieli Fowler, ut filio & hæred' de corpore præf. Edw. Fowler legitime procreat', virtute cujus præf. Ga. in præd' messuag' & sex acras pastur' parcell' &c. cum pertinent' intravit, & fuit inde seisit' in dn'ico suo ut de feod' talliato, viz. sibi & hæred' de corpore suo legitime procreat', reversione feodi simplicis inde hæred. dicti Jo. Barton testatoris spectan', ad usus in dicta ultima volunt' præf. Jo. Barton testatoris express. performand': Et præf. Gab. Fow. exitus & proficua inde ad usus & intentiones in eod' testament' præd' Jo. Barton testatoris performari limitat' recepit exposuit & expendidit, a tempore mortis præf. Edw. Fow. infra quinque annos prox. ante ann' primum regni regis Edwardi sexti scz. usque quartum diem Maii anno regni nuper regis Henrici octavi tricesimo sept': Quorum præmissorum prædictorum prætextu, ac vigore cujusdam actus in parlamento ipsius domini Edw. nuper regis Angliæ sexti apud Westmonasterium in com. Middl' quarto die Novembris dicto anno regni sui primo inchoat', & ab inde continuat' usque xxiv diem Novembris extunc prox. sequen', & adtunc & ibidem tent', concernen' Collegia liberar' Capellas, Cantarias fraternitat' gild' & alias spiritual' promotiones edit' & proviss. præd' nuper rex Edw. sextus immediate post festum Paschæ prox. sequen' post editionem actus præd' fuit seisit' de & in præd' messuag. & præd' sex acris pastur' parcell' &c. cum pertin' (int' alia) in eodem testament' ut præfert' dat' & appunct' in dominico suo ut de feodo in jure coron' suæ Angliæ, si lex Angl' sic in hoc casu postulat & requirit, posteaque idem nuper rex obiit de præd' mess. & sex acr' pastur' sic seisit', si lex Angl' hoc postulat, sine hæred' de corpore suo exeunt'; Post cujus mort' mess. præd' & præd' sex acr' pastur' parcell' &c. cum pertin' inter alia descendeabant dn'æ Mar' nuper reg. Angliæ, ut forori & hæred' præd' nuper regis Ed. 6. si sic lex Angl' in hoc casu postulat, per quod eadem nuper reg. Mar' fuit seisit' de mess. præd' & de præd' sex acr' pastur' parcell' &c. cum pertin' inter alia in dn'ico suo ut de feodo in jure coron' suæ Angl', si lex Angliæ hoc postulat & requirit, & eadem nuper regina Maria postea & ante prædict' tempus quo &c. obiit sic inde seisit', si lex Angliæ sic in hoc casu postulat, sine hærede de corpore suo exeunt', post cujus mortem messuag' prædict'

prædict' & præd' 6 acr' pastur' parcell' &c. cum pertin' inter alia descendebant dict' dominæ reg' nunc, ut forori & hæred' præd' nuper reg. Mar', si lex Ang. sic in hoc casu postulat, per qd' eadem domina regina nunc fuit de præd' mess. & præd' 6 acris pastur' parcell' &c. cum pertin' inter alia seifit' in d'nico suo ut de feod' in jure coron' suæ Ang. si lex Ang. sic inde postulat & requirit. Et jurat' præd' ulter' dic' super facram' suum præd', quod post præd' actum Parliamenti præd' anno regni præd' nuper regis E. 6. prim. edit', præd' Gabriel' Fowler occupat' præd' mess. & 6 acr' pastur' cum pertin' parcell' &c. continuavit, & fuit inde seifit' in dominico suo ut de feod' talliato, si lex Ang. sic in hoc postulat & requirit, habens exit' de corpor' suo legitime procreat' quendam Ri. Fowler, & sic inde seifit' continuavit occupat' præd' si lex Ang. postulat & requirit; Et postea & ante præd' tempus quo &c. ff. 1 die Maii anno regni dictæ dom' Reg. nunc 18 apud Buck. præd' de tali statu suo obiit inde seifit', si lex Ang. postulat & requirit: Prætextu cujus, mesuag' præd' & sex acr' pastur' prædict' cum pertin' parcell' &c. descendebant, si lex postulat, præf. Ri. Fowler ut filio & hæred' ipsius Gab. Prætextu cujus idem Rich. Fowler, postea & antea præd' tempus quo &c. in mess. & sex acr' pastur' præd' cum pertin' parcell' &c. intravit, & fuit inde seifitus in dominico suo ut de feodo talliato, viz. sibi & hæred' de corpore suo legitime procreat', si lex Ang. hoc postulat & requirit. Ipsoq; Ric. Fowler de mesuag' & sex acr' pasturæ præd' cum pertin' parcell' &c. sic seifit' existen', si lex Ang. hoc postulat, idem Rich. postea & antea prædict' tempus quo &c. scil. decimo nono die Marcii anno regni dict' dom' Reg. nunc 33 apud Buck. præd' per quoddam scriptum suum geren' dat' eisdem die & anno, sigillo præd' Rich. sigillat' & jurat' præd' in evidenc' ostens. pro quadam pecuniæ summ' in eod' scripto specific', si per legem Angl. hoc potuit, feoffavit quosdam Franciscum Dayrell & Edw. Dayrell gener', de mess. & 6 acris pastur' prædict' cum pertin' parcell' &c. inter alia: Habend' eisd' Fran. & Edw. hæred' & assign' suis imperpetuum, virtute cujus iidem Fran. & Ed. in mesuag' & sex acr' pastur' præd' parcell' &c. intrav' & fuer' inde seifit' in d'nico suo ut de feodo si lex Ang. hoc postulat & sic inde seifit' existen', si lex Ang. hoc postulat, iidem Franciscus & Edw. postea & ante prædict' tempus quo &c. scil. 18 die Junii anno regni dictæ dominæ Reginae nunc tricesimo tertio supradicto, apud Buck. præd', si per legem Angliæ hoc potuissent, feoffaverunt prædict' Johannem Lambert de præd' mesuag' & sex acr' pastur' parcell' &c. cum pertin': Habend' & tenend' eidem Johann' Lambert hæred' & assign' suis imperpetuum, prætextu cujus idem Johannes Lambert postea & antea prædict' tempus

ADAMS & LAMBERT's Case. PART IV.

tempus quo &c. scil. eodem decimo octavo die Junii anno tricesimo tertio supradict', in mess. & sex acr' pastur' præd' parcel' &c. cum pertinen' intravit, & fuit & adhuc est inde seisit' in dominico suo ut de feodo, si lex inde postulat. Et jur' præd' ulterius dicunt super sacramentum suum præd' qd' præf. dom' Reg. nunc sicut præfertur seisit' in dominico suo ut de feodo in jurâ coronæ suæ Ang', de & in præd' mess. & sex acr' pastur' parcel' &c. si lex Angl' hoc postulat, postea & ante prædict' tempus quo &c. scil. vicesimo septimo die Maii anno regni sui tricesimo quarto eadem domina Reg' nunc per literas suas paten' magno sigillo suo Ang' sigillat' jurator' præd' in evidenc' ostent. quarum dat' est apud Westm' eisdem die & anno, in consideratione boni veri fidelis & acceptabilis servicii eid' dom' Reg' nunc antetunc tempor' per prædilectum consanguineum suum Thomam Comitem Ormond' & Oforiæ fact' & impens. quam pro diversis aliis causis & considerationib' præf. dom' Reg' nunc adtunc specialit' moven', necnon ad humilem petition' ipsius Comit', de gratia sua speciali ac ex certa scientia & mero motu suis, dedit & concessit pro se hæc' & success. suis dilect' subit' suis Ed. Downing & Rog. Rant, gener' mess. prædict' & præd' sex acr' pastur' cum pertinen' in quo &c. inter alia per nomen totius illius nuper Cantar' suæ voc' *Barton's Chantery*, scituat' & existen' in Paroch' S. Petri in villa Buck' cum suis juribus membris & pertinen' universis in com' Buck. ac omnes terr' tenemen' reddit' & hæredit' sua quæcunq; cum eor' pertin' univers. scituat' jacent' & existen' in dict' villa Buck' & in præd' com' Buck. dict' nuper Cantar' voc' *Barton's Chantery*, spectan' vel pert', sive ad sustentationem capellani sive presbit', & al' usus superstit' in Ecclesia S. Petri præd' juxta ordination' Joh' Barton sen' antetunc dat' legat' limitat' vel appunctuat' existen': Habend' tenend' & gaudend' eisd' Edm. Downing & Ro. Rant hæc' & affig' suis ad solum & propr' op' & usum ipsor' Ed. & Rog. hæc' & affig' suor' imperpet'; reddend' & solvend' præf. dom' Reg. nunc hæc' & success. suis annuat' imperpet', de & pro præd' nuper Cant' voc' *Bartons Chantery*, & cæter' præmiss. eid' spect' cum pertin' 13 l. & 20 d. legalis monetæ Angliæ, ad manus receptor' general' com' præd' pro tempore existen' seu ad receptum scaccarii dict' dom' Reg' hæred' & success. suor' ad festa S. Mich' Archangel', & Annunc' beatæ Mariæ virgin', per æquales porciones singulis annis solvend', pro omnibus reddit' exactionib' servic' & demand' quibuscunq; proinde dict' dom' Reg' & success. suis quoquo modo reddend', solvend', vel faciend'. Et præf. dom' Reg' nunc per dict' literas suas paten' pro se hæc' & success. suis concess. præf. E. Downing & R. Rant qd' dict' lit' suæ paten' vel irrotulam eorund' esset valid' firmæ

firmæ sufficien' & effectual' in lege erga eand' dom' Reginam nunc, hæred' & success. suos, tam in omnibus cur' quam alibi infra regnum suum Angl' absq; aliquib' confirmationib' licenc' vel toller' de præf. dom' Reg. nunc hæred' vel success. suis, imposter' per præf. Edm. & Rog. hæred' vel assign' suos, aut eorum aliquem vel aliquos procurand' vel obtinend': Non obstant' male nominand', vel male recitand', aut non recitand', præd' feperal' maner' rector', mess. terr', tenemen', ac cætera omn' & sing' præmiss. aut aliq' inde parcel': Aut non obstant' non inveniend' offic' & inquisition' præmiss. aut aliqujus inde parcel', per quæ titulus dom' Reg' nunc inveneri debuit ante confectio' literar' paten' præd': Et non obstant' non recitand', vel male recitand' alicui' dimiss. vel concess. de præmissis, aut de aliq' inde parcel' ante tunc fact' existen' de recordo, vel non de record': Et non obstant' aliquib' aliis defect' de certitudine computat' aut declaration' annui valor' præmiss. vel non declaratione annui val' præmiss. vel alicui' inde parcel' aut annual' redd' reservat' de & super præmiss. aut alic' inde parcel', in dictis liter' patentes express. & content': Et non obstant' aliis defect' de non nominand' aut in male nominand', aliquem tenen', firmar', sive occupat' terr' tenem' achæreditament' præd', sive aliquor' alior' præmiss. aut alicui' inde parcel', aut nominand', aut non recte nominand' aliquam villam, hamlett', paroch', aut com', in quib' præmiss. aut aliq' parcel' existunt seu existit: Ac in non nominand' præmiss. sive aliquam inde parcel' in natura, genere, specie, sive qualitate: quarum quid' literar' paten' prætext' præf. Edm. Downing & Rog. Rant fuerunt de præd' mess. ac prædict' sex acr' pasturæ parcell' &c. cum pertinen' inter alia seisit' in dominico suo ut de feodo, si lex Angliæ sic in hoc casu postulat' & requirit: Et sic inde seisit' existen' si lex Angliæ hoc postulat, & præd' J. Lamb' continuand' poss. suam præd' inde, & sic ut præfertur inde seisit' existen', si lex Angliæ hoc postulat, iidem Edm. Downing & Rog. Rant per quandam indent' fact' 28 die Julii anno regni dict' dom' Reg' nunc 34 suprad', inter præf. E. Downing & R. Rant ex una parte, & quend' R. Snelling de Easthorsley in com' Surr' gen' & T. Butler de Grays Inn in com' Midd' gen' ex altera parte, pro quad' pecuniæ summ' bonæ & legalis monetæ Angliæ eis præ manib' per præf. R. Snelling & T. Butler bene & fideliter solut', tradiderunt, concesserunt, vendiderunt, barganizaverunt, & confirmaverunt præf. R. Snelling & T. Butler hæred' & assign' suis imperpetuum, messuag' prædict' ac præd' sex acr' pastur' parcell' &c. cum pertin' int' alia: Habend' & tenend' præf. R. Snelling & T. Butler hæred' & assign' suis imperpet', prout per indent' præd' irrotulat' indors. claus. Cancellariæ dominæ Reginæ nunc 10 die

Decembris

Decembris anno regni ejusd' dom' Reg. nunc 35. Jur' præd' similiter in evidenc' ostens. inter alia plenius liquet & apparet; cujus quidem indentur' ac irrotulament' ejusdem prætextu, præf. Rob. Snelling & Tho. Butler fuerunt de prædict' mess. & de præd' sex acris pasturæ parcell' &c. cum pertin' in quibus &c. inter alia seifit' in dominico suo ut de feodo, si lex Angliæ sic in hoc casu postulat & requirit: Et præf. Rob. Snelling & Tho. Butler sic inde seifisti existen', si lex Angliæ hoc postulat, postea & ante præd' tempus quo &c. ff. præd' 23 die Maii anno regni dict' dom' Reg' nunc 36 supradicto, in præd' mess. & præd' sex acras pasturæ cum pertin' parcell' &c. intraver' & fuerunt inde seifit' in dominico suo ut de feodo, si lex postulat; Et sic inde seifit', & prædict' J. Lambert continuand' possess' suam præd', si lex Ang' hoc postulat, iidem R. Snelling & T. Butler præd' 23 die Maii apud dict' vill' Buck. demiserunt & ad firmam tradiderunt mess. præd' ac præd' sex acris pasturæ parcell' &c. cum pertin' (inter alia) præf. Tho. Adams: Habend' eidem Tho. Adams executoribus & assignat' suis, a prædict' 23 die Maii anno regni dictæ dom' Reg' nunc 36 supradicto usq; finem & termin' præd' decem annor' plenar' complend' & finiend'; virtute cujus idem T. Adams in mess. præd' & in præd' sex acr' pastur' parcell' &c. cum pertin' (inter alia) postea ff. 16 die Aprilis anno regni prædict' dom' Reg' nunc 39 intravit & fuit inde possessionat', si lex in hoc casu postulat; super cujus quidem Theoph' possession' inde præf. J. Lambert postea ff. eodem 16 die Aprilis anno 39 suprad' in mess. præd' & in præd' sex acr' pastur' parcell' &c. cum pertinentiis intravit, eundem Theophilum Adams a firm' sua prædict' inde termino suo prædict' inde nondum finit' ejecit, expulit, & amovit, ipsumq; Theophilum a possessione sua inde extratenit, & adhuc extratenet, prout præd' Theophilus superius versus eum narravit: Sed utrum super tot' mater' præd' in form' præd' compert', videbit' curiæ hic qd' præd' Joh. Lambert est culpabilis de transgress. & eject' præd' Theo. Adams, de & in mess. præd' & præd' sex acr' pasturæ parcell' &c. cum pertin', necne jurat' præd' penitus ignorant, & inde petunt avisament' cur' hic &c. Et si super tot' mater' ill' in form' præd' compert', videbit' cur' hic qd' præd' J. Lambert est culpab' de ejectione & transgress. præd' Theo. de mess. præd' & præd' sex acr' pastur' parcell' &c. cum pertin'; tunc iidem jurat' dic' super sacrm' suum præd', qd' præd' J. Lambert est culpabilis de transgress. & ejectione inde, prout præd' Theophilus superius versus eum inde queritur, & tunc assidunt dampna ipsius Theophil' occasione transgress. & eject' illar', ultra miss. & custag. sua per ipsum circa sect' suam

in hac parte apposit' ad 12 d. & pro mis. & custag. ill' ad 12 d. Et si super tot' mater' præd' in form' præd' compert' videbitur cur' hic qd' præd' J. Lamb. non est culpabilis de eject' & transgress. præd', de & in præd' mesuag' & præd' 6 acris pasturæ parcell' &c. cum pertin', tunc iidem juratores dicunt super sacramentum suum præd', qd' præd' J. Lamb. non est inde culpabilis, prout idem Joh. pro se superius placitando allegavit: Et ulterius juratores prædict' dicunt super sacramentum suum qd' prædict' Joh. Lambert in nullo est culpabilis de transgression' & ejection' prædict' in 4 acr' pastur' de prædict' 10 acr' pasturæ resid' superius fieri supposit', prout præd' Joh. Lambert superius inde placitando allegavit &c. Et quia cur' dict' dom' Reg' hic de judicio suo de & super præmiss. reddendo nondum advisatur, dies inde dat' est partibus præd' coram eadem dom' Regina apud Westm. usq; diem Veneris prox' post crastin' Sanctæ Trin' de Judicio suo de & super audiendo, eo qd' cur' dict' dom' Reg. hic inde nondum &c. *Et sic de Termino in Terminum*, usq; diem Martis prox' post crastin' Animarum de judicio suo de & super præmiss. audiendo, eo qd' cur' dict' dom' Reg' hic inde nond' &c. Ad quem diem cor' ead' dom' Reg' apud West. ven' partes præd' in propriis personis suis: Super quo visis, & per cur' dictæ dom' Reg. hic plenius intellectis omnibus & singulis præmiss. maturaque deliberatione indè habit', pro eo qd' videt' cur' dict' dom' Reg. hic, qd' prædict' J. Lamb. est culpabilis de transgress. & ejectione præd' T. Adams de & in mesuag. præd', & præd' 6 acr' pastur' parcell' &c. cum pertin'; Ideo consider' est qd' præd' T. Adams recuperet versus præf. J. Lamb. terminum suum præd' adhuc ventur' de & in præd' mesuag. & præd' 6 acr' pastur' præd' 10 acr' pastur' parcell' cum pertin', ac dampna sua præd' per jur' præd' in form' præd' assess. necnon viginti & quinq; lib. pro mis. & custag. præd', eid' Th. Adams per cur' dom' Reg. hic ex assensu suo de incremento adjudicat'; quæ quidem dampna in toto se attingunt ad viginti quinq; lib. & duos sol. Et præd' J. Lamb. capiat' &c. Et similiter prædict' T. Adams in m'ia pro falso clamore suo versus præf. J. Lamb. pro resid' transg' & ejection' præd', unde idem J. Lamb. superius acquietat' existit: Ideo idem J. Lambert quoad resid' transg. & ejectionis ill', eat inde sine die &c.

Mich.

MICH. 44 & 45 ELIZABETHÆ.
In the King's Bench.

ADAMS & LAMBERT'S Case.

Hern. 198.
Mo. 648, 649, 650,
&c. i Kollskrep.
49, 50.

Lit. Rep. 111.

IN Ejectione firma in the King's Bench, between Adams and Lambert, which began — of Lands in Buckingham with- in the County of Bucks, upon Not guilty pleaded, the Jurors gave a special Verdict to this Effect; *John Barton* was seized of the said Lands in Fee, and made a Feoffment in Fee to perform his Will, and afterwards by his Will in writing devised the said Lands to *John Barton* his younger Brother for his Life, *sub conditionibus sequentibus, viz. Quod idem Johannes durante vita sua, inveniat unum Capellanum pro anima dicti Joh. Barton senioris, & aliorum in Ecclesia Sancti Petri in vill' de Buck' quotidie celebratur: Et voluit qd' prad' Joh. frater suus annuatim durante vita sua persolvat dicto Capellano in prad' Ecclesia pro sustentat' sua 6l. 13 s. 4d. de exitibus & proven' tenementor' prad'. Et insuper voluit qd' dict' Joh' frater suus durante vita sua inveniat in vill' prad' 6 pauperes homines sive femin' ad orand' pro anima sua & alior' in testamento prad' nominat' singulis diebus imperpetuum: Et quod daret qualibet septimana durante vita sua cuilibet ipsorum pauper' 4d. & etiam cuilibet ipsorum manson' prout (Deo disponente) pro eis constituit & ordinavit: Ac etiam qd' idem Joh' frater suus tota vita sua inveniat unum lampad' ardent' singulis diebus & noctibus coram Sancto Romwaldo in Ecclesia prad', prout modo inventus est & sustentatus; & qd' idem Joh' frater suus durante vita sua teneat seu teneri faciat Anniversarium suum in Ecclesia prad', in quo quidem Anniversario inveniet idem Joh' frater suus annuatim duos cerceos nocte ad Dirige, & die sequente ad Miss. unum scilicet ad caput, & alterum ad pedes sepulturae dict' testat' ardentis, quolibet cereo ponderant' tres lib' quibus exequiis complet',*
voluit

voluit qd totum id qd de dictis cereis resid' fuerit, dimittat' & reman' altari S. Jacobi in Ecclesia prad' super candelabrum ibid' existen' Capellano cantar' sua prad' singulis diebus festivis ad Miss. quamdiu durare poterit deservitur: Et quod idem Joh' frater suus tota vita sua durante, inventiat annuat' unum torcher' competent' ad altare prad' deservitur: Et voluit qd omnia prad' tenement' post mortem prad' Joh' fratris sui integre remanerent Marg' & Isab' sororibus suis, ad vitam earum & earum alterius diutius viven': sub conditione quod eadem M. & I. earum vita durant', faciant perimpleri & observari omnia onera superius limitat' in forma prad'. Et post mortem prad' Marg' & Isab' voluit qd omnia prad' tenement' remaneant Will. Fowler tenend' sibi & hered' de corpore suo legitime procreat'; sub conditione qd ipsi observent omnia & singula onera superscript' in forma antedict' imperpet', Et si contingat prad' Will. Fowler sine hered' de corpore suo legitime procreat' obire, tunc om' & sing' prad' tenem' integre reman' Joh' Somerton consanguineo suo & hered' de corp' suo legitime exeun', sub conditione qd ipsi omnia & singula onera superscript' in forma prad' perimplcant & observent imperpet': Et si ipsum Joh' Somerton absq; hered' de corpore suo legitimi' exeun' obire contigerit, qd extunc omnia prad' tenementa integre reman' Will' Purfrey & hered' suis de corpore suo legit' exeun', sub condic' qd idem Will' & hered' sui, faciant perimplcant & observent omnia & singula onera in forma prad' imperpet': Remanere pro defect' hujusmodi exit' Magistro domus S. Tho. Martyris de Acon' Lond' pro 40 ann' extunc prox' sequen' & plenar' complend': Et post term' ill' finit' reman' Magistro hospital' S. Barth. Lond' & success. suis pro 40 ann' extunc prox' sequen' & plenar' complend': Cui-libet eorum sub condic', quod quilibet eorum Magistr' & success. suorum durante eor' term', faciant & perimplcant omnia & singula onera supra limitat' in forma supradict': Et si contingat prad' Joh' fratrem suum durante vita sua in persciend' onera supradict' deficere, seu ill' non perimplere, aut omnia predicta tenementa durante vita sua non competent' sustentare & reparare, seu ea aut aliquam parcel' earund' alienare sive ad parvum valor' ea dimittere in prejudic' cater' personarum in remaner' supradict' nominat'; quod extunc bene licebit pras. Marg' & Isab' in prad' tenementa cum pertin' intrare, & ea retinere ut in reman' suo prad' absq; contradic' alicujus, & qd extunc status prad' Joh' fratris sui omnino cessat, & nullius sit valoris: And the like Condition or Limitation of Forfeiture is annexed to all the Remainders in the same Will, and if all in Remainder forfeit, the said Lands to remain to the said John Barton the Testator, and to his Heirs for ever. Supportandum, &c. Et quia haec mea voluntas pro bono animarum patris & matris meorum, anima etiam mea animabusq; fratrum, soror', parentum & benefactorum meorum edita fuit, & ordinata: Precor & onero prad' fratrem meum, prout pro me & se voluerit respondere,

Cr. Jac. 576.

ADAMS & LAMBERT'S Case. PART IV.

quod ipse tota vita sua diligenter supervideat gubernatione cantar' supradict' ; & quod omnia suprascripta & in hac mea ultima voluntate declarat' inviolabiliter perimplcant' & conservent' : Et quod notitiam fac' omnib' hiis qui in reman' prad' statum habebunt in dictis tenementis, ut ipsi cognoscant tenor' & effect' testamenti & ultime mee voluntat'. Et volo qd' feoffati mei de tenement' cum suis pertinent' qd' mei pauperes homines modo inhabitant pro eo quod est divisibile, faciant talem statum post mortem meam omnibus illis supranominat', prout habeant ex meo legato de & in tenementis in Buck' prad', ad usum prad' pauperum ibid' habitant' supportand' reparaciones illius tenementi prad' pauper' quoties indegerit : Et quia dubito ne tenement' suprad' sufficiant ad supportand' omnia prad' onera, causa grandi custus reparacion' eorundem, volo qd' feoffati mei statim post mortem meam faciant talem statum omnibus illis supranominatis, de omnibus illis terris & tenementis meis in villis de Bourton, Moreton, Gavecot cum prebend' Lembergh, Thornborough, Hillefden, Waterstratford, Shaldeston & Foycote in com' Buck' ac de omnibus illis terris & tenementis meis in Worton in com' Oxonia, ac de uno tenemento meo in villa Oxonia in quibus feoffati exiiterunt, prout habent ex meo legato de & in tenementis de Buck. prad' : Ita quod sufficienter omnia onera prad' possint sustentare, et etiam pro labore inde rationabiliter percipere & obtinere. And this Case was often argued at the Bar, and afterwards it was openly argued in Court by *Yelverton* and *Fenner* Justices in one Day, and by *Gawdy* and *Popham* Chief Justice in another. And in this Case (which extends to all the Parts in effect of the Body of the Statute of 1 E. 6. cap. 14.) these Points were resolv'd.

i. Altho' in this Case the Land was devised to his Brother for Life, the Remainder to his Sisters, &c. between whom as was objected, was apparent Consideration of Nature, and every one by the Law of Nature is bound to provide for his Blood and Posterity in reasonable Manner ; and altho' the Devisor has limited what Sums shall be employ'd upon the Chaplain, *Obit*, &c. by which his Intent (as it was objected) appears to advance them of his Blood (to whom he had devised the Land) with the Residue of the Profits which remain'd, and whereof no certain Disposition was made by him, that by the Law the Land being devised to them they should take the Surplusage of the Profits (of which no Disposition was made) to their own Use, and the apparent Consideration of Advancement of his Blood expresses his Intent, that after the Divine Services (as it was then thought) were perform'd, those of his Blood should be maintain'd and reliev'd with the Residue, wherefore his Blood should have the Land, and the Chaplains, &c. should have Pensions, and so in Respect of the Persons the Land was not given to the King ; yet it was resolv'd, That Wives, Sons, Daugh. Sisters, Cousins, and other dear

dear Friends, were Persons within this Act; for if Men as well in their Lives, as by their Testaments after their Deaths, used to put and repose Confidence in their Kindred and dear Friends, for their temporal Goods, *a multo fortiori*, when they intend to dispose of their temporal Possessions for the Health of their Souls (as it was then thought) they would convey them to those in whom they had the greatest Confidence: And in these Cases of Divine Service concerning the Health of the Soul, it shall not be intended any Advancement or Preferment of his Blood, or any other earthly Consideration, unless it is so declar'd by express Words; but all shall be intended for the Advancement and Continuance of the Intents and Purposes express'd, *s.* Divine Services as Things without all Comparison most worthy and excellent; and he who betrays such Trust (the Divine Service being according to the Law of God) is by many Degrees a greater Offender than he who doth not perform Trust or Confidence concerning temporal Things, for he who robs his Friend commits Felony, and he who robs poor Men of their Living is a greater Thief by the Law of God, for *Panis pauperum vita pauperum, & qui defraudit eos vir sanguinis est*: But he who takes away any thing that is given for the Divine and true Service of God, *est sacrilegus, & omnium pradonum cupiditatem & scelera superat*: And altho' it appears by the Preamble of the Act that the devising and phantasing of vain Opinions of Purgatory and Masses satisfactory to be celebrated for those who were dead, was great Cause of Superstition and Error in Christian Religion, &c. yet forasmuch as the Devisor and Devisees in the Case at Bar were (as they were taught) persuaded that it was for Divine Service and the Health of Souls, it shall be intended that their Intentions were to advance such Uses, and not the private Advantages of the Devisees: and therefore it was resolv'd, that the Person, be he of Blood or not, single, or corporate, or politick, to whom the Land is devised or convey'd, is not to be respected, but all is one within the Purview of this Act. And this was resolv'd as to the Persons of the Devisees, Feoffees, &c. within this Act. 2. Altho' it was objected, that forasmuch as the Land was devised for Life the Remainder in Tail, and a Reversion of the Fee expectant to the Heirs of the Devisor was not devised, and the Letter of the Act is, *To the finding of any Priest to have Continuance for ever*, upon which it was said, that an Estate for Life and an Estate Tail, which were Estates limited and determinable, were not within the Letter or Intention of this Act, & *eo potius* because the Makers of the Act by the first Branch have provided, when a Priest was appointed to be found for ever, and by another Branch subsequent, when he was to be found for Years,

Postea 116 a

Co. Lit. 342.
8 Co. 121. a. b.

Duke 92

ADAMS & LAMBERT'S Case. PART IV.

by which special and precise Enumeration of these two Cases, the Makers of the Act intended to exclude Estates in Tail, and Estates for Life, so that Estates in Tail and for Life *sunt casus omitti* as it was said: Yet it was resolv'd, that Estates in Tail and Estates for Life also were included by Equity and Meaning within the former Branch, for the Intent and Meaning of the Act as appears by the Preamble, was to extirpate out of Mens Minds these superstitious Errors, and to take them utterly away, in what Manner, or for what Time they were given, and not to take them away only which were appointed to have Continuance for ever, and leave those to have Essence which were determinable or limited for a Time: And forasmuch as the Statute by express Words abrogates and takes away all such superstitious Uses which were to have Continuance for ever, by Equity and good Construction it extends to every less Time whatsoever. Also it was said, that the Statute says, *by any Manner of Assurance, Conveyance, &c. for ever*, and by common Possibility an Estate Tail may continue for ever. Also in this Case at Bar the Intent of the Devisor was (as appears by his Will) that the Priest should be found for ever, for he appoints also his right Heirs to find him: And if such Construction should not be made, the Mischief intended to be remedied by the Act would remain against the Intent and Meaning of the Act: And in the Clauses of Obits, the Words are, *To have Continuance for ever*. And yet it was agreed in the Case of *Winchester* that an Obit being appointed to be found for 8 Years was included within the Equity of the Act: So it was resolv'd 22 *Eliz.* in the *Dean of Paul's Case*, That a College or Chantry in Reputation, altho' it wants sufficient Foundation and Incorporation in Law, was given to the King by the said Act, and the Reason was, because the Intent of the Makers of the Act was to take away all Superstition out of Mens Minds, and not to suffer any to have Continuance; and Superstition was maintain'd as well in reputative Chantries, as in others; and yet it was not within the Letter of the Act, for in Judgment of Law it was no College nor Chantry; for *Reputatio est vulgaris opinio ubi non est veritas*. And this was resolv'd as to Estates devised to superstitious Uses within the Purview of this Statute. 3. Where it was objected, That this Devise of the Land was not to the Intent to find a Chantry or Stipendary Priest, or to the finding of a Priest as the Statute speaks, but was upon Condition to find him, so that if the Priest shall not be found, the Estate shall cease, and the said third Branch of the Act doth,

Duke 91, 107.
Lanc 101.

Duke 92. 10 Co.
83. b. 21 Co. 13. a.
Dy. 368. pl. 47.
4 Leon. 156, 157.
Goldsb. 93.
Jenk. Cent. 245.
1 Roll. Rep. 127.
Postea 108. a.

2 Inst. 668.
Postea 107. b.

doth not speak of any Estate conditional, but only where the Priest was to be found for ever; and therefore an Estate conditional shall be out of the Purview of the Act: But it was answer'd and resolv'd, that it was within the said Act, for when the Land is devis'd upon Condition to find a Priest, without Question this Land is devis'd, *To the finding of a Duke 91. 107.* Priest, &c. as the Statute speaks. And it is a stronger Case where it is devis'd upon Condition, than where it is devis'd to the Intent, or for the finding of a Priest, for the Condition is more compulsory and penal for the Maintenance of Things prohibited by the Law. *Nota Reader*, there is one Proviso *versus finem actus*, by which it is provided, That it shall not be lawful for any Person by Reason of any Reversion, Use or Condition to enter, or claim any Land for not finding of any Priest, or poor Men, Obit, Anniversary, Light, or Lamp, after the said Act to be found or done. By which it appears, by the Judgment of the whole Parliament, that Land given upon Condition or other Determination and all Estates whereof there were Reversions expectant, be they Estates Tail, for Life, or any other particular Estate, were within the Act. And this was resolv'd for the Manner of Conveyance or Assurance of Lands to superstitious Uses within this Act. *Duke 91. 107.* 4. It was resolv'd, that all the Land in this Case was given to the K. by the said Act, which was the principal Point of the Case, and of great Consequence, and that for divers Reasons; for the better Understanding of which, 5 of the first Branches of the Act are to be consider'd. 1. Are given to the King, *All Manner of Colleges, free Chappels, and Chauntries, &c.* 2. *All Manors, Lands, Tenements, &c. belonging to them or any of them.* 3. *All Manors, Lands, Tenem' &c. by any mean Assurance, Conveyance, &c. given, assigned, limited or appointed to the finding of any Priest to have Continuance for ever, and wherewith or whereby any Priest was sustained, maintained or found, within 5 Years, &c.* *1 Co. 24. B.* 4. *And also all annual Rents, Profits and Emoluments at any Time within five Years, &c. employed, paid or bestowed toward or for the Maintenance or finding of any Stipendary Priest for ever.* 5. *Shall be in the actual and real Possession of the King, &c. in as large and ample Manner and Form, as the Priest, Wardens, Masters, Ministers, Governors, or other Incumbents of them within five Years, &c. had occupy'd or enjoy'd the same, and as tho' the Colleges, free Chappels, Chauntries, Stipends, Salaries of Priests, and the said Manors Lands, &c. were in this Act specially particularly, and certainly rehearsed, named and express'd by express Words, &c.* And the Consideration of every of these Clauses was requisite for

ADAMS & LAMBERT'S Case. PART IV.

the deciding of this Point, for the true Exposition of one of them serves very well for the good Understanding of the others: As to the first Clause it was resolv'd, that some of the Colleges, Chauntries, &c. which were not lawfully founded, but were only in Reputation, were given to the King by the said Act, and some not, and therefore this Difference was agreed, that where the Collège, Chantry, &c. had such Beginning which might have made a lawful Foundation, but for Error or Imperfection in the penning or proceeding of it, was not in Judgment of Law lawfully founded, such College or Chantry is given to the King by the said Act: But when there is a College or Chantry only in vulgar (a) Reputation, without any Commencement or Countenance of a lawful Foundation, or erected by such Means which can't make a lawful Foundation, there such College or Chantry is not given to the King by this Act. *Nota Reader*, the Rule is, *Quod (b) reputatio est vulgaris opinio ubi non est veritas, & vulgaris opinio est duplex; s. Opinio vulgaris orta inter graves & discretos, & qua vultum veritatis habet; & opinio tantum orta inter leves & vulgares homines absque specie veritatis*: And accordingly to this Distinction it has been adjudg'd and resolv'd by all the Justices upon this first Branch of this Act: And therefore *Hill. 6 & 7 E. 6. Dyer 81.* which was immediately after the making of the said Act, the Case was, That Pope *Urban* at the Request of *Ralph Baron of Greystock* founded a College of a Master and six Priests resident at *Greystock*, and assign'd to each of the Priests 5 Marks *per annum*, besides their Bed and Chamber, and the Master 40 l. *per ann'* and it was certified into the Book of First Fruits and Tenths *Rector' & Colleg' de Greyff'*, and this College was *in esse* within 5 Years before the said Act; and it was resolv'd by the Justices, that this reputative College was not given to the King by the said Act of 1 E. 6. because it wanted a lawful Beginning, and the Countenance also of a lawful Commencement, for the (d) Pope can't found or incorporate a College within this Realm, nor assign nor licence others to assign temporal Livings to it, but it ought to be done by the King himself, and by no other, *Nomen non sufficit, si res non sit de jure aut de facto*, and it is as much as if one of his own Head had erected and founded a Chantry without Licence or Authority derived from the King: But *Mich. 9 & 10 Eliz. Dyer (e) 267.* where the Case was, that King *E. 1. anno 12* of his Reign, by his Letters Patents under the Great Seal, granted to *Tho. Beale* then Bishop of *S. Davies* and his Successors, the Advowson of 34 Churches in *Wales* within his Diocess, to hold of the K. and his Successors, so that the Bishop and his Successors might appropriate them, or any of them to their Churches of *S. Davies*

(a) Cro. Jac. 51.
1 Roll. Rep. 127.
Lit. Rep. 131.

(b) Antea 106.b.
3 Inst. 668.

The Case of
Greystock Col-
lege.

(c) Dy. 81. pl. 64.
Dyer 267. pl. 13.
Stiles 52.
Lit. Rep. 108.
30 Co. 34. b.

(d) 5 Co. 26. a.
Cawdry's Case.

The Case of the
College of Lan-
dwybrevic.

(e) Moor 650.
10 Co. 34. b.
Dyer 267. pl. 12.
13. Hob. 123.
Palm. 125.
1 Roll. 463.

vies and *Aberguelley*, or make and annex Prebends of them in the said Churches of *S. Davies* and *Aberguelley*, as to them should seem most convenient; and three Years after, the Bishop by the King's Assent (as the Bishop in his Instrument affirm'd) of the Chapter of *S. Davies*, erected and establish'd a College, or Church Collegiate, & *quidquid celebratus Collegii deposciti autoritate sua supplevit in Landwybrevy*, being one of the 34 Churches, and ordain'd 13 Canons secular there, *s. 5* Priests, 4 Deacons, and 4 Subdeacons, and made them Prebends and Prebendaries, and annexed and appropriated 13 of the said Churches to them, &c. and reserv'd to the Bishop himself and his Successors as Dean, *Locum in choro, & vocem in Capitulo*, and also Visitation and Corrections, &c. In which the Bishop did not pursue the Authority and Power given him by the said Letters Patents, for by them no Power was given him to found such College; and afterward King *E. 3.* by his Letters Patents reciting the said Foundation and Erection of the said College, and all other the Premises, with some Doubt of the Validity of it, by his said Letters Patents granted and confirm'd to the then Bishop of *S. Davies* and his Successors, all that which his said Predecessor had done in the Premises, the Statute of *Mortmain*, or any Statute notwithstanding; and notwithstanding the said College was erected or founded, and the Appropriations made without the King's Licence; which Grant and Confirmation being made to the Bishop and his Successors, could not make the said College (which wanted lawful Erection and Foundation) good in Law; and yet by these Pretences the said College of (*a*) *Landwybrevy* continu'd a College in Reputation till 1 *E. 6.* And it was resolv'd by the Justices of both Benches, that this College was given to the King by the said Act of 1 *E. 6.* because this College had the Countenance of the King's Letters Patents, altho' they for the Causes aforesaid were not of Effect, and the Statute saith, *All and all Manner of Colleges, &c.* And such reputative College is within the said Act, and Power is given to Commissioners by the said Act to establish a Vicar in every College which was a Church Parochial, and so upon this Difference concerning Reputations, it was resolv'd in the Case of the *Dean of Paul's*, *Pasch. 22 Eliz.* between *Burton* and *Wilford*, by *Wray* Chief Justice, *Sir Thomas Garvody & totam Curiam* of King's Bench, which Case is for other Points shortly touch'd in 22 *Eliz. Dyer 368.* And so in this Case at Bar it was resolv'd, altho' the Devisor calls it his Chantry twice in his Will, as appears before; for he wills that the Devisee shall find two Tapers burning at his Anniversary, and that which remains the Chaplain of his said Chantry shall have: And afterwards he charges the Devisee to oversee the Government of his said Chantry.

(a) Hob. 103.
Antea 106. b.
Dyer 366. pl. 47.
4 Leon. 156. 157.
&c. Goldsb. 93.
20 Co. 83. b.
11 Co. 13. 2.
Jenk. Cent. 245.

ADAMS & LAMBERT's Case. PART IV.

try, and that it was commonly call'd *Barton Chauntry*; yet because it had not any Commencement or Countenance of a Commencement of an Erection or Foundation of a Chauntry, these Lands were not given to the King by the first Branch of this Statute. Also altho' in the proper Words of the Law a Chauntry may consist of a Priest singing for Souls (whence he is call'd a Chauntry Priest) without any Incorporation, as appears by *F. N. B. (a) 209. L. and the Register*, That if a Man gives Lands to a Religious House or other, to find a Chaplain singing Divine Service, if he ceases for two Years, the Lord shall have *Cessavit pro Cantaria*, and the Writ shall say, *Ad inveniendum quendam Canonicum pro animabus antecessorum, &c. divina celebrant'*. So in the Statute of

(c) Moor 650.

6) F.N.B.209.L. *W. (b) 2. c. 41.* such finding of a Chauntry Priest is called a Chauntry, for there it is said, *Et si forte tenementum sic datum pro Cantaria, Luminare, &c.* and yet it is not any Corporation of a Chauntry: Altho' in *40 Ass. 26.* where a Man devised Lands to *H. C.* and his Heirs, to find yearly 12 Marks to two Chaplains to pray for Souls, these are called Chauntry Lands by *Knevet Chief Justice, 43 (c) Ass. 27.* yet within this first Branch such Chauntry is only intended when the Chauntry is lawfully incorporated, or at least has the Countenance, or Beginning of a Corporation, and that for divers Reasons as after appears: And so it was resolv'd what Manner of Chauntries, Colleges, &c. were given to the King by this Act, and what not. As to the second Clause, it was resolv'd; 1. That those Words were necessary to be added, for otherwise by the Gift of the College, Chauntry, or free Chapel, nothing would be given to the King, but the Scite of the College, or Chauntry, or free Chapel, as is agreed

(c) Moor 649.

(d) Dy. 233. pl. 13. *7 Eliz. Dyer (d) 233. b. & 29 Ass. 53.* Secondly, this 2d Branch explains, that they ought to be Incorporations in Law, or in Reputation as is aforesaid, or otherwise Land, &c. could not belong to them: And when Lands are devised to certain Persons (as in the Case at Bar) to find a Chaplain, the Land doth not belong to the Chaplain, but to the Devisees, and here the Chaplain has but a Pension, and the Devisees have the Lands. As to the third Branch, it was resolv'd, that as the first Branch extends only to Colleges and Chauntries, which are of some Manner of Incorporation or Foundation as is aforesaid; So this third Branch extends to Cases, where Lands are given to find a Priest without any Foundation or Incorporation: But it was objected, that in the Case at Bar in Respect of the Certainty of the Sum appointed to the Priest that it was out of this third Branch, and within

the

the 4 and 5 Branches; for the third Branch (as was objected) extends only when the Land is given limited or appointed to the finding of a Priest to have Continuance for ever: But in the Case at Bar nothing is limited or appointed to the Priest, but a certain Stipend of 6 l. 13 s. 4 d. *pro sustentatione sua*: And therefore it was said, If Lands of the Value of 20 l. *per ann.* are given to find a Priest, and that the Priest out of the Issues and Profits of the Land shall have 10 l. for his Sustentation, it was said this Case was out of this third Branch, and within the express letter of the fourth Branch, for here is the yearly Sum of 10 l. which is a yearly Profit within five Years employed for the Maintenance and finding of a stipendiary Priest for ever; and in the Case at Bar he is but a stipendiary Priest because his Stipend was certain. But if Lands of the Value of 20 l. *per ann.* are given to find a Priest without any Limitation in certain, and the Feoffees employ 10 l. in certain upon him, yet it was there agreed, that all the Land was given to the King, because the Gift was directly within the third Branch, and not within the fourth for the Incertainty. It was likewise objected, that the fifth Clause doth greatly enforce this Case, for thereby it appears, that all that which the Priest had, the King shall have; *In as large and ample Manner and Form as the Priest at any Time within five Years, &c. had occupied and enjoyed the same*: And in this Case the Priest within the five Years nor any time before had not by the Limitation aforesaid, nor could have above the Sum of 6 l. 13 s. 4 d. and to prove their Pretence the Case of the *Dean of Paul's*, 22 *Eliz. fo. 368.* was cited, where the Case was, That the Executors of *A. B.* according to the Will of their Testator, anno 6. *E. 2.* assigned and conveyed Lands and Tenements to the Value of 14 l. *per ann.* to the Dean and Chapter of *Paul's*, to find a competent Sustentation yearly of 10 Marks Sterling, for a Priest and his Clark to sing Mass every Day for the Testator's Soul and all Christian Souls in the Church of *S. Paul*; and the said Dean and Chapter ought to find Bread, Wine, Candles, and all other Ornaments for Divine Service; and all the other Profits of the Premises by the Executors were assigned to be employed for the yearly Obit for the said Testator in the said Church; The Priest was maintained within the five Years, and had 6 l. 13 s. 4 d. *per ann.* but the Obit was not kept within the 5 Years. And it was resolv'd by the Justices of both Benches, and the Barons of the Exchequer, that the Queen should not have more than the 6 l. 13 s. 4 d. and that for two Reasons. 1. Because the Land was not belonging to any Chantry, but appertained to the Dean and Chapter of *Paul's*: Also the Words of the Statute are, That the King shall have the Land or Rent *in tam amplis modo & forma*, as the Priest himself had,

Antea 106. b.
108. a. 10 Co.
83. b. 11 Co.
13. a. Dyer 368.
Pl. 47. 4 Leon
156, 157, &c.
Goldsb. 93.
Jenk. Cent. 245.
Moor 131, 264.

ADAMS & LAMBERT's Case. PART IV.

(a) 1 Co. 24. a.
26. a. 10 Co.
24. a. 34. a.
2 Rol. 787, 788.

and the Priest had not the Land; and these in Effect are the Words of the Book. The second Objection was, that in this Case there was a good Use, *s. (a) 4 d.* by the Week to six poor Men apiece, which is good and charitable; and altho' it be added, *Ad orandum pro anima sua, & aliorum in testamento præd' nominat' in singulis diebus*, yet for as much as that is not prohibited by any Branch of the said Act, it is but Surplusage, and is no Impediment to the good Use: For if it shall be prohibited by any Clause of the said Act, it shall be by the Branch concerning Obits, *s. To the finding of any Anniversary, Obit, or other like Thing, Intent, or Purpose.* And it may be said, That this praying for Souls by these poor Men, is another *like Intent and Purpose*; But the Conclusion of the Sentence is, *In any Church or Chappel to have Continuance for ever*: So that the Intent of the Act was to prohibit all superstitious Uses, which were publick in Churches for the general Prejudice which might accrue by them; for *Malum quo communius eo pejus*, and not to prohibit private Prayers in their Chambers, or other private Places, which could not tend to so dangerous an Example. Then the Case is no other but that Land of the Value of 20 *l. per ann'* is given to the intents following, *s. to find a Priest to pray for Souls, and that he shall have 10 *l.* of the Profits of the Land, and 6 poor Men 4 *d.* apiece a Week for ever, in this Case, this good Use (as it was strongly urged) shall save the Land, and the King shall have but that which was limited to the Priest, *s. 10 *l.** for it was not the Intent of the Act to take away the good Use, but the Land should remain with the Feoffees to perform it, and so much as was limited to the superstitious Use should be given to the King; and to prove this divers Cases were cited. First, a Case in the King's Bench, *anno 21 Eliz. inter (b) Hewet & Wotton* for Lands in *Exeter*, where the Case was, That *Gervase Luissant* enfeoffed divers of the said Lands, and willed that they should find a Priest to sing Mass in the Church of *S. Mary* every Sunday, and a *Dirge & Mass de requiem* once a Year for his Soul, and that they of the Issues and Profits of the said Lands should pay to the said Priest 2 *d.* every Week, and the Residue of the Profits to be employed upon Books, Vestiments, and other Ornaments of the Church aforesaid, and it was adjudged, that altho' the Land was given to find a Priest, yet for as much as his Stipend was certain, and also was joined with a good Use, that the Land was not given to the King by the said Act, but only the Stipend which the Priest had. Another Case was adjudged in the same Court, *Trin. 30 Eliz.* but it began *Pascha 28 Eliz. Rot. 431.* in Trespas between *John (c) Chibnal Pl.* and *W. Witton* and *Chr. Witton Defts.* for an House in *Fleest.* called, *The Angel**

(b) Duke 92.
Hewet & Wot-
ton's Case.
Postea 114. b.
Moor 131.
1 And. 100.

(c) Duke 92.
Chibnal &
Witton's Case,
Co. Ent. 197.
pl. 7. Postea
114. b. 2 Sid. 15.

sur

sur le Hoop; upon Not guilty pleaded, and upon a special Verdict found the Case was such; *Bennet Harlewyn* 36 H. 6. by his Will in Writing devised to the Master and Brethren of the Guild of Drapers of London 3 s. 4 d. yearly, to be employed for the Relief of the poor Brethren and Sisters of the same Guild, and devised the said House to the Parson and Churchwardens of S. Christopher's Parish and their Successors, *Ad inde solvend' annuatim præd' reddit' 3 s. 4 d. per me superius concess'*; & quod ipsi de exitibus inde solvant annuat' qualibet septimana uni Capell' in Eccles. S. Christoph' Mis-
jam celebrand' imperpet' pro anima mea 3 d. Et quod solvant qualibet septimana tribus pauperibus ejusdem parochie 6 d. ad orandum pro anima mea; Et quod celebrari faciant annuat' unum Anniversar' distribuend' 13 s. 4 d. in forma sequenti, viz. cuilibet Capell' interessenti illo anniversario 4 d. & quod 12 d. inde annuat' solvant custodibus operis Ecclesie ad usum fabricæ corporis Ecclesie, & 12 d. ad sustentationem fraternitatis S. Christoph'eri, residuum 13 s. 4 d. expendatur in pane & potu inter Capell' & alios pauperes eo die anniversarii ad exorandum pro anima mea; Ac quod Gardiani habeant de exitibus inde 6 s. & 8 d. pro laboribus suis: Residuum de exitibus reseruetur in pixide ad sustentation' & reparacionem dictorum tementorum & (cum opus fuerit) ad novam adificacionem faciend'; And all these were employed within the five Years. And it was adjudged in that Case the King should not have the Land, and the Reason (as was said) was because the 3 s. 4 d. to the Poor of the Guild of Drapers, and also the 6 d. to the other 3 Poor of the Parish (altho' the 3 Poor were appointed to pray for Souls out of the Church, &c.) were good Uses, and therefore the finding of a Priest gave not the Land to the King. But yet it was resolv'd and adjudg'd that this Case at Bar was within the said third Branch of the Act, and that the Land was given to the King by the said Act. And for the better and more perspicuous Knowledge and Understanding of the Resolution of the Justices in this Case, I am oblig'd to avoid great Prolixity and Intricacy, to reduce all their Reasons and Causes of their Resolutions to these six Differences, all which necessarily concern the Case at Bar, as well for the Confirmation of their Resolutions, as for the Confutation of all Objections, and also for the true Understanding of all the former Resolutions and Judgments, amongst all which by these Differences excellent and perfect Unity and Agreem. appear. The 1 Diff. was, If a Man gives Lands of the yearly Value of 20 l. to others, to the Intent to find a Priest to pray for Souls, and that the Priest shall have of the Issues and Profits of the Lands 10 l. for his Salary, without any other Limitation, that in
that

Postea 114. b.
Cro. El. 799.
Moor 30, 31.

The. 1 Diversity
Duke 107. Cro.
Car. 455. 456.

ADAMS & LAMBERT'S Case PART IV.

that Case all the Land is given to the King; But if the Land is given upon Condition, or to the Intent that the Feoffees shall pay of the Issues and Profits of the Lands 10*l.* to a Priest to pray for Souls without any other Limitation, that the King shall not have the Land, but only the Rent of 10*l.* out of the Land; And the Reason of this Difference is, because the first Case is within the third Branch of this Act, for the Land it self was given to find a Priest, according to the Letter of the Act, and in as much as he was maintained with 10*l.* of the Issues and Profits of the Land, it was within the Words subsequent of the said 3 Branch, *f. wherewith, or whereby any Priest was maintained.* For by the Land and the Profits of it he was maintained, and no Use shall be intended but that which the Donor expresses, and the Maintenance or Augmentation of it, and for as much as the Land was given to find a Priest, altho' he limits in certain how much the Priest shall have for his Salary and Living, yet to the finding of a Priest to pray for Souls other Things are necessary which are employed in such Gift, *f. Garments, Books, Wine, Bread, &c.* And the penning of these Branches concerning finding of Priests, differs much from the penning of the other Clauses concerning Obits, for there the Words of the first Clause are, *Given, assigned, or appointed, to go or be employed wholly to the finding or Maintenance of any Anniversary, &c.* And the 2 Clause is, *And where but Part of the Issues or Revenues of any Manors, Lands, &c.* But no such Distinction is expressed within the Branches concerning Priests, And the Reason of the second Part of the Difference, *f.* When the Feoffees are appointed to pay out of the Land a certain Sum to a Priest, *&c.* and because the Land it self is not given upon Condition, or to the Intent to find a Priest; But the Feoffees are limited or appointed to pay to the Priest 10*l.* and therefore the King can't have more than was given to the finding of the Priest; and that was 10*l.* as the Priest's Stipend, and not the Land which was not given for the Maintenance, or finding of the Priest; and therefore the King shall have the 10*l.* only by Force of the said fourth Branch of this Act; for that is in Nature of a yearly Rent, Profit, or Emolument; and therewith agrees the Judgment in the said Case of the Dean * of *Pauls.* The second Difference was, If Land of the yearly Value of 20*l. per ann'* be given upon Condition, or to the Purposes following, *f.* to find a Priest to pray for Souls, and that the Priest shall have for his Salary 10*l.* and to distribute between twenty of the poor Men and Women other 10*l.* yearly for ever for their Sustentation, in that
Case

Duke 107. 2 Rol.
Rep. 205, 206.

* Antea 106. b.
The 2 Diversity.
108. 2109. a. 11 Co.
13. a. Dyer 368.
pl. 47. 4 Leon.
156, 157.
Goldsb. 93.
10 Co. 83. b.
Jenk. Cent. 245.
Mo. 131, 264.

Cafe the King shall have but the 10 *l.* limited to the Priest, and not the Land: But if the same Land had been given to find a Priest, and for the Maintenance of 20 poor Men, in that Cafe the King shall have all the Land, altho' in the Employment the Priest had 10 *l.* and the Poor the other 10 *l.* And the Reason and Cause of this Difference is because in the first Cafe there was a good Use separate and distinct from the superstitious Use; and therefore, God forbid that the ill Use shall swallow up the good Use, and a certain Sum was appointed to the Priest, which Sum the King shall have as a Rent by Force of the said fourth Branch; And in such Cafe if the Land shou'd be given to the King, the good Use wou'd be taken away, which was never the Intent of the Act; for the Intent of the Makers was, as appears by the Preamble, to advance and continue good and charitable Uses, as Grammar Schools, Augmentation of the Universities, and Provision for poor Men, as is expressed in the Preamble. And there is another Clause concerning the Continuance of such charitable Uses in the Body of the Act, by which Power is given to certain Commissioners, *To assign in every Place whercin any Guild, Fraternity, Priest, or Incumbent of any Chantry, by the Foundation, Ordinance, or first Institution thereof, should or ought to have kept a Grammar School, or a Preacher, &c.* And also to enquire, *What Money, Profit, or Benefit any poor Person by virtue of any Conveyance, &c. had or enjoyed within five Years, &c. out of any College, free Chappel, or Chantry, and other the Premises given, limited or appointed to the King by this Act;* and thereupon to make Assignments to the Poor, which Clause is to be intended only when the Provision for the Poor is derived out of a superstitious Thing, or to be performed by the Person who was to do the Superstition, as out of a College, or Chantry, or free Chappel, or when all the Land was given to find a Priest, and that the Priest should find a Grammar School, or Preacher, or should pay so much to poor Men: And in such Cafe it was necessary to make such Provision; for the Colleges, Chantries, free Chappels, and Priests praying for Souls, who should make Distribution to the Poor, &c. were dissolved, and their Possessions given to the King by this Act, and therefore it was very well and necessary to add the said Clause for Continuance of the said charitable Uses, But that it doth not extend to, when Lands are given to divers Feoffees upon Condition, or to the Purposes following, *s.* to find a Priest, and of the Issues of the Land to pay him a certain Stipend, and out of the Residue of the Profits, that the Feoffees shall find a gram. School, or sustain

poor

Hob. 124. Duke
107. Moor 265.
2 Roll. Rep.
206, 207. Cro.
Car. 249. Cro.
El. 449

Co. Lit. 342. a.
1 Co. 24. b.

ADAMS & LAMBERT'S Case. PART IV.

poor Men, for these are not derived out of the superstitious Use, nor to be distributed by the superstitious Persons, but by the Feoffees, &c. who remain Persons able to distribute, and continue the good Uses, which are distinct from the superstitious Uses; And the Reason of the second Part of the last Difference is because nothing is limited to the superstitious Use in certain by the Donor, or Devisor himself, so that if the King shou'd not have the Land, the K. would have nothing, but the superstitious Use wou'd remain, and the Intention of the Act (as hath been said, and so it ought to be expounded,) was to take away all such Superstition; for the King can't have any Rent in such Case, for every Rent ought to be a certain Sum; And altho' in such Case the Feoffees have always employed a certain Sum, yet they have not Power to make Alteration of the Substance of the Gift, but the Intent of the Donor shall stand. A 3 Difference was taken, when the Priest has a certain Salary, (and yet to the finding of him other Things, as Books, Bread, Wine, Vestiments, &c. as has been said are *tacite* implied and requisite which are uncertain) and beside that a good Use is limited, there the K. shall not have all by Reason of the implied Incertainty; But if Land is given to any express superstitious Use prohibited by the Act, without Limitation of any Certainty for the finding of it, there all is given to the King by the said Act; the Reason of the first Branch of this Difference is, that a good Use expressed shall be preferred before any Thing implied, and incident to a superstitious Use. 2. The finding of Books, Vestiments, Wine and Bread, are not of themselves superstitious, therefore the Makers of the Act did not intend to respect them, as appears by divers Resolutions and Judgments hereafter cited, but when the expressed Intent was not only to find a Priest, but also a good Use, there the King shall have only that which the Priest himself had, or which he was intended to have; The other Part of this last Difference is agreed and resolved before.

The 4 Difference, or *potius* an Explanation of the former Differences, was taken between a sole Priest to pray for Souls within the third Branch, and a stipendiary Priest within the fourth Branch; for when Lands are given to one or divers Feoffees to find one single Priest with the Issues and Profits thereof, with a certain Limitation of some Sum for his Sustenance, there if no good Use is limited (as hath been said) all the Land is given to the K. for the Reasons aforesaid: But when a certain Sum is limited to the Priest for his Stipend, and beside that a good Use is expressed, it amounts to as much as if the Land had been given that the Feoffees should pay a certain Sum of Money to a Priest, in which Case he is a stipendiary Priest within the fourth Branch of the Act, and in such Case

(2) Cro. El. 449.

The 3 Diversity.
Cro. Car. 249.

Hob. 124.
Moor. 266.

The 4 Diversity.

the King shall have but a Rent. The 5 Difference was taken, When a certain Sum is limited to a Priest, and divers other Uses are also limited, which of themselves are not prohibited, yet if they depend upon the superstitious Use, all is given to the King. As if a Man gives Land of the Value of 20 *l.* and that the Feoffees of the Profits of the Land shall pay to a Priest 10 *l.* and the Residue for Vestiments, Books, Bread, Wine, &c. for the Celebration of Mass, &c. or to one or divers to visit, and see that the Service be done, or for the Reparation of the Chappel in which the Service is to be done, or for the repairing of the Tenements, or to poor People to be present at it, or some such like Intents or Purposes which depend upon the superstitious Use, or for an Ornament or Continuance of it, there all is given to the King, but when the other Uses are not depending upon it, but extend to distinct and separate good Uses, there the good Uses shall save the Land. As if Land to the Value of 20 *l.* is given to pay a Priest 10 Marks to sing for Souls in such a Church, and the Residue of the Profits to repair the Church, altho' that by a Means concerns the Continuance of the said superstitious Use, for as much as it is to be celebrated in the same Church; or in such Case if the Residue of the Profits were limited for the finding of the Ornaments of the Church, altho' they are by a Means Ornaments also for the Celebration of the said superstitious Use, yet in both these Cases, in as much as the Reparation of the Church, or the finding of the Ornaments does not depend upon the superstitious Use, nor immediately concerns the superstitious Use, in such Case the Land is not given to the King: So in the same Case, if Part of the Profits are limited for the Repairs of the Church, or to find the Ornaments of the Church, and the Residue of the Profits are limited for the Reparation of the Houses so given, the King shall not have the Land; for Reparation of Houses of themselves is not an Use prohibited, and therefore being joined with a good Use shall save the Land, and yet by a Means both concern the Continuance of the superstitious Use: But the Statute is to be intended of immediate Uses, and not only to suppress superstitious Uses; but also to continue good Uses, according to the Intent of the Makers of the Act. The 6 Difference was observed, When all the Uses are superstitious, and when not; for when all the Uses are superstitious, there in what Certainty or Manner soever they are limited, and of what Value soever the Land is, yet all the Land is given to the King. As if Land of the Value of twenty Pounds *per annum* is given to the Intent, that ten Pounds out of the Issues and Profits thereof shall

The 5 Diversity;
Litch. 38.

Cr. El. 449. Cr.
Car. 249.

Cr. Car. 248,
456.

The 6 Diversity;

ADAMS & LAMBERT's Case. PART IV.

shall be paid to a Priest 5 *l.* for the Maintenance of the Obit, and 5 *l.* to find Lamps and Lights before such Images in such a Church: In this Case it was objected, That the K. shall have but several Rents, for the Priest was but a stipendiary Priest, and the Land was not given to find him: Also the Clause concerning Obits, &c. gives to the King but a Rent, when but Part of the Profits are limited and appointed to it; and therefore by none of the said several Branches by itself the K. shall have the Land but only several Rents: But it was resolv'd that in such Case, all the Land by the Equity and true Construction upon all the said Act shall be given the King; for inasmuch as all the Profits are limited to superstitious Uses, it was the Intent of the Act to give all the Land to the King by a reasonable Construction upon the Coherence and Intention of all the Parts of the Act: And as to the Objection which was made, That the King in the principal Case shall not have more than the Priest had, because the fifth Branch, which is the Conclusion of all the four Branches precedent has such Words, *In as large and ample Manner and Form, as the Priests, Wardens, Ministers, Governors, Rulers, or other Incumbents of them within five Years, &c. had occupied or enjoyed*: It was resolv'd, that these Words do not abridge that which before was by any of the precedent Clauses given to the K. 2. That these Words can't be referred to the third Clause, *s.* When Land was given to one or divers Persons to find with the Issues and Profits a sole Priest, for there the Priest had not the Land; and therefore if the said Clause was restrictive, and if the King should not have more than the Priest had, the King would have nothing, for the Priest had nothing, and yet every one agrees, that the King in such Case shall have the Land. But these Words are referred, *reddendo singula singulis*, to the 1, 2, & 4 Branches, for by the first two the Land, and by the fourth a Rent is given to the King; and therefore the said Words may well be referred to them, and can't be refer'd to the said fourth Branch, for the King can't have the Land, *in as ample and large Manner as the Priest had it*, when in Truth the Priest had nothing in the Land, but the Feoffees were seized thereof; or the said Words refer only to the fourth Branch concerning Stipendiary Priests, as *Popham* Chief Justice held: And the Case at Bar was within all these Differences; for 1. The Land was devised upon Condition to find a Priest. 2 In this Case one of the superstitious Uses was uncertain, for, for the finding of Lamps and Lights no certain Sum was limited; and if all the Land had been given to this uncertain Use, the King should have had all the Land. 3. Here was not any good Use, for altho' the Maintenance and Sustentation of poor Men was good, yet Maintenance of them to pray for Souls was superstitious, and prohibited by the

said

said Act: And altho' these Prayers are not appointed to be made in any Church, Chapel, &c. or other publick Oratory, yet it was resolv'd, that it was prohibited by the said Act, or (as some held) directly within the Words of the Clause concerning Obits, *f. Anniversary or Obiz, or other like Thing, Intent, or Purpose, or of any Light or Lamp in any Church or Chapel*: So that these Words *In any Church or Chapel*, are referr'd only to *Lights or Lamps*, and not to those preced. Words or other like Thing, *Intent, or Purpose*. And praying for Souls, is a like *Intent or Purpose* to an Anniversary or Obit, for all was to pray for Souls, or as others held by the Equity of the said Act which intended to extirpate all praying for Souls: And it seem'd to some that the Case is stronger, because the principal superstitious Use is to be done in the Church.

4. These Prayers for Souls by the poor Men are in a Manner dependant upon the other superstitious Uses, and of one and the same Kind, and Nature with them. 5. In this Case all the Uses were superstitious, and therefore all the Land was given to the King: And by these Differences you may (as hath been said) better understand the Judgments and Resolutions which have been before these Times had upon the severall Branches of this Act, and every one of them well stands with the other, and no Contrariety amongst them. And all these Differences are well proved and approved by former Resolutions, Decrees, and Judgments; and therefore I will make a summary Report of the former Resolutions, Decrees, and Judgments which were cited and vouch'd in this Case, and first of the Resolutions:

Sir Bartholomew Read by his Will in writing devised his Lands in London to the Company of *Goldsmiths*, to the Intent that they with the Issues and Profits should repair the Tenements, and should pay all Rents issuing thereout, and should keep an Obit, and should spend at it yearly 33 s. 4 d. and find perpetually a Priest to sing Mass for his Soul, who should also keep a Grammar-School, and chiefly for the Poor, and to receive 10 l. yearly for his Salary, and the said Tenements were then of greater Value, *f. of 50 l. per ann.* than the said superstitious Uses. And it was resolv'd by *Wray* and *Anderfon* Chief Justices, upon Conference with *Sir Roger Manwood* Chief Baron, and *Periam* Justice, that all the Tenements were given to the King by the said Act, for altho' there was a good and charitable Use, *f. to find a Grammar School chiefly for the Relief of the Poor*, yet because it was mix'd with a superstitious Use, and nothing in certain was limited to the good Use, in such Case the incertain Mixture of the bad Use with the good Use infects the good Use, as a little Poison mixt with a great Quantity

1 Co. 24. b.

Hob. 123.
1 Rolls Rep. 417.Sir Bartholomew Read's Case.
Moor 654.

ADAMS & LAMBERT's Case. PART IV,

of Wine, or as Truth mixt with Covin (Covin is so ill an Herb) that it makes the whole unfavoury, and turns the Goodness of the one into the Badness of the other, as it is said in *Pl. Com.* 51. *a.* Secondly, the good Use is deriv'd out of the superstitious Use, and to be perform'd by the Priest, for these Reasons the good Use in this Case shall not save the Land. Also altho' now upon the Matter it is as if the good Use had been omitted, and that a certain Sum was limited for every of the Uses, yet when all the certain Uses were superstitious, all the Land shall be given to the King. Another Case was resolv'd by them, that Sir *John Tate* seized of certain Houses in *London* by his Will in writing devised them to the Company of *Dyers* to repair the Houses, and to find a secular Priest for ever to pray for Souls in the Church of *S. Michael* in *Cornhill*, paying to him a competent Living not less than 8 Marks *per ann.* and the Houses then were of greater Value; and yet because it was uncertain what Sum the Priest should have, and if the Sum had been certain, yet because the Land was given to find a Priest, and no good Use was limited, the King shall have all the Land by the said third Branch of the said Act.

Sir John Tate's
Case. Duke 94.
Hern 208.

John Allen's Case
& Anderf. 97.
Moor 264.

Another Case resolv'd by them was, that *John Allen* by his Will in writing devised Houses in *Eastcheap* to the Company of *Goldsmiths* in *London* to find an Obit for ever, which Houses then were and so continu'd of the Value of 33 *l.* 13 *s.* 4 *d.* *per ann.* and 23 *s.* 4 *d.* were only employ'd to the said superstitious Use. And it was resolv'd, that the King should have all the Land, for the Devisees by their certain Employment can't save the Land when the Gift itself is uncertain, nor any Disposition in certain by the Devisees can alter the Nature and Substance of the Gift, nor the Operation of the Statute upon it.

Pele's Case.
Duke 95.
Hern. 209.

Another Case was also resolv'd by them; One *Pele* devised by his Will in Writing certain Houses in *London* to the *Clothworkers* of *London*, to the Intent that they for ever should pay to such Priest who should pray for his Soul in the Parish Church of *Chilham* 9 *l.* 6 *s.* 8 *d.* for his Salary; the King shall not have the Houses, for they were not given to find a Priest, but to pay to a Priest a certain Sum.

Walpool's Case.
Duke 95. 2 Sid. 14.
Hern. 209.

One *Walpool* in 23 *E.* 3, by his Will in writing, devised to the Company of *Goldsmiths* in *London*, certain Houses in *London* of the Value of 30 *l.* *per ann.* to the Intent, that they with the Issues and Profits thereof should find two Priests, paying to each of them 6 *l.* 13 *s.* 4 *d.* for his Salary; and it was resolv'd by the said Justices, that the Queen should have the Houses, for it was within the third Branch of the Act,
inasmuch

inasmuch as the Land was given to find two Priests, and wherewith or whereby they were maintain'd, &c. and forasmuch as no good Use was limited, and all the Use express'd was superstitious, for these Reasons it was resolv'd, that the Houses were given to the King, and yet the Salaries of the Priests were certain.

Anno 4 H. 8. William Caley by his Will in writing devised certain Houses in London of the Value of 40 Marks per ann. to the Company of Drapers, to the Intent to repair them sufficiently for ever, and of the Issues and Profits of them to maintain a Chaplain in the Church of S. M Woolnaugh, to sing Mass every Day for the Souls of Rich. Shore and his Wife, and to have for his Salary 6 l. 13 s. 4 d. and to find an Obit in the same Church for the Soul of the said Richard Shore, spending upon it 20 s. in Form following, s. the Wardens of the said Company shall have Part, and the Beadle Part and Part to be spent upon Bread, Beer, and other Necessaries at Drapers Hall amongst the Brethren there, and the Residue to be distributed amongst the Poor dwelling within the Precinct of their Hall to pray for Souls, and altho' the Salary of the Priest was certain, and the Expences of the Obit were certain, and the Prayers for the Souls were to be made in Drapers Hall, and not in any Church or Chapel, and the Distribution of Bread and Beer amongst the Poor is of itself a good and charitable Use, yet forasmuch as all the Uses were superstitious or depending thereupon, it was resolv'd, that the Houses were given to the King by the said A&T.

Caley's Case.
Moor 653, 654.
1 Anderl. 90.

Anno 5 E. 4. Gregory by his Will in writing devised his Houses in London of the Value of four Marks per annum to the Company of Skinners, to the Intent with the Profits thereof to find an Obit for ever in the Church of S. Anthony, spending at it 6 s. 8 d. and to distribute amongst the Poor of the said Parish to pray for one Soul 6 s. 8 d. and with the Residue of the Profits to maintain the Reparations, and with the Overplus to new build them when Need should be; and altho' the Sum for the said superstitious Uses (whereof one was to be done out of the Church or Chapel) were certain, and the Reparation and new building of the Houses themselves were good, because they concern'd the Habitation of Men; yet forasmuch as these Uses were for the Continuance of the superstitious Uses, & quodammodo depending thereupon, for this Reason it was resolv'd, that the Houses were given to the King by the said A&T: Several other Resolutions of the said Justices were cited, but forasmuch as they all tend to the Effect of those which have been cited before, to avoid Prolixity I have omitted them. Nota Reader, the Branch of the said A&T next following the last Clause of Obits, concerning the Employment of the Sums

Gregory's Case.

ADAMS & LAMBERT's Case. PART IV.

of Money, or Profit of any Lands, by any Corporation, Guild, Fraternity, Company, or Fellowship of any Mystery, or Craft, for the Maintenance of a Priest, Obit, &c. was but Explanation of the said fourth Branch, to oust a Scruple which some might conceive, Whether a Body incorporate might stand seized to such Intents, and upon such Trusts as is aforesaid: But it appears by all the said Resolutions, as well Bodies Politick and Corporate as private Persons are within the former Branches of the said Act, for the Letter of the Act is general and includes all as in this very Case it was resolv'd. Now to proceed to Decrees; In 5 E. 6. as it appears *in libro Decret' in officio Rememer' Dom' Regis*. In the Exchequer divers Decrees were made upon the Will of (a) *Comberton in 5 H. 4. of Cromer (b) in 10 H. 6. of William Rus (c) in 11 H. 6. of one Penne in 5 H. 6.* and of divers others in the Court of Augmentation; but because they are agreeable to the said Resolutions and Differences before taken as I conceive, altho' they are not fully there written, I will omit them and proceed to Judgments given in the Queen's Courts upon Argument and great Consideration judicially. And as to the Cases of *Hewet & (d) Wotton, & Chibnal (e) & Witton*, they were affirm'd to be good Law, and that there were two principal Reasons of the Judgment in the same Cases: One because nothing was limited to the Priest but 2*d.* or 3*d.* every Week, which was not within the said third Branch of the Act, for with such a small Sum a Priest can't be found or maintain'd. And the Letter of the said Statute is *To the finding of any Priest, &c. and wherewith or whereby any Priest was sustain'd, maintain'd or found*; and with such small Allowance he can't be sustain'd, maintain'd, or found. Also in the one Case he should sing Mass but every Sunday, and *Dirige* once a Year, which was (as was said) within the Clause of Obits, *s. To such like Intent or Purpose*. 2. Admitting a certain Salary had been to the Priest sufficient for his Maintenance, yet because there were good Uses (f) separate from the superstitious Use, *s. in the one Case 3 s. 4 d. to the Poor, &c.* and in the other to find Ornaments of the Church, for these Reasons Judgment was given in both the Cases, that the Land was not given to the King. It was also adjudg'd for these two Reasons that were given in *Hewet & Wotton's* Case (for the said two agreed with the said Case of the Dean of (g) *Paul's*, which the L. Dyer has briefly touch'd in Part) that the Q. shall not have the Land for two Reasons. 1. Because the Land (h) itself was not given to find a Priest, so that it was not within the third Branch of the Act, but to find an annual Sustentation of 10 Marks for a Priest.

(a) Moor 649.
652.
(b) Moor 652.
(c) Moor 659.

(d) Duke 92.
Antea 109. b.
Moor 131.
1 Anderf. 100.
(e) Antea 109. b.
Duke 92.
Co. Ent. 197. pl. 7.
2 Siderf. 15.

(f) Duke 92.

(g) Antea 106. b.
103. a. 129. a. 130. b.
Dyer 368. pl. 47.
4 Leon. 156, 157.
Goldsb. 93.
20 Co. 83. b.
Jenk. Cent. 245.
Moor 121, 264.
(h) Duke 92.

So that it was within the fourth Branch, and not within the third. 2. It was resolv'd in the said Case of the Dean of *(a) Paul's*, that if Land is given to pay 10 Marks to a Priest, and 40 s. to the Maintenance of an Obit, in that Case if both are found within the five Years, the King shall have all the Land, because both the Uses were superstitious by the Judgment of the Law, upon the Coherence, (as has been said) of all the Act: But in the same Case because the Obit was not found within the five Years, it was therefore adjudg'd, that the King should not have the Land: And therefore in the same Case of the *Dean of Paul's*, this Difference was taken and resolv'd, when certain Sums are limited to the superstitious Uses, and one Use is separate and divided from the other, there the finding of the one shall not give the whole Land to the King, but only the Sum appointed to the superstitious Use which was employ'd within the five Years: But if the one Use depends upon the other, there the finding of the Principal or any Part of it gives all the Land to the King. As if Land is given to the Intent that an Obit shall be found in such Chapel, and that upon the Obit 10 s. shall be distributed and employ'd to the Priest, and to divers poor Persons who shall be present at it 6 s. 8 d. and the rest of the Profits to the Reparation of the said Chapel, in this Case if the Obit is maintain'd in any Part within the five Years, altho' the 6 s. and 8 d. is not employ'd to the poor Men, nor any thing upon the Reparation of the Chapel within the five Years, yet all the Land shall be given to the King, because all the Uses depend upon the first: So in the same Case *Wray* Chief Justice said, that it was adjudg'd, that where certain Houses call'd the *Bull* were given to find a Priest to pray for Souls, &c. and other Tenements call'd the *Swan* were given to the same Feoffees to find an Obit, &c. and the Feoffees employ'd the Profits of the said several Houses to contrary Uses, *s.* the Profits of the *Bull* to find the Obit, and the Profits of the *Swan* to find the Priest, yet forasmuch as the original Gift was superstitious, and the Employment superstitious, altho' the Employment did not pursue the Gift, yet in both Cases such Employment within the five Years was sufficient to give the Land to the King. So if a Man gives the Manor of *Dale* and *(c)* the Manor of *Sale* to find superstitious Uses, and the Feoffees with the Profits of the one Manor find the superstitious Uses, and employ the Profits of the other to the Use of the poor Inhabitants of the same Town, or to bear the common Charges of the Town, yet both the Manors are given to the King, for if the Feoffees employ any Part of the Profits of the Lands which they have, and which were given for the Maintenance of the superstitious Uses, all is given to the King; But if the Feoffees before the five Years have convey'd Part of the Land to another in Fee, and employ the Profits

(a) Antea 106.b.
108. a. 109. a.
110. b. 114. b.
Dyer 368. pl. 47.
4 Leon. 156, 157.
Goldfb. 93.
10 Co. 83. b.
Jenk. Cent. 245.
Moore 131, 264.

The Case of the
Swan & Bull.
(b) Duke 93.

(c) Duke 93.

ADAMS & LAMBERT'S Case. PART IV.

of that which remains in their Hands for the Maintenance of the superstitious Uses, and no Part of the Profits of the Land of the second Feoffee is employ'd within the five Years, there the King shall not have the Land of the second Feoffee, but only the Lands which the first Feoffees have, for the Employment by the first Feoffees of the Land which they had cannot bind the second Feoffee, for the Land in which they had not any Estate or Interest; and that well stands with the Words of the said third Branch, *s. To the finding of any Priest, and wherewith or whereby any Priest was sustain'd, maintain'd, or found within five Years*; for as to the Land convey'd to the second Feoffee (whereof no Part of the Profits was employ'd to superstitious Uses within the five Years) that is not within the said Words of *wherewith or whereby*, for neither with nor by the Land of the second Feoffee the superstitious Uses were found within five Years, but only with, and by the Land which remains with the first Feoffees; and in the said Case of the *Dean of Pauls*, some held that a Proviso that the said Act shall not extend to the Manors, Lands, Tenements, or other Hereditaments of any Cathedral Church, &c. other than to such Chaurtries, Obits, or Lamps, or any of them within five Years, &c. and in the said Case the Land was Parcel of the Possessions of a Cathedral Church; and the said Land did not appertain to a Chantry, *s. within the first or second Branch*, but that Case was within the fourth Branch, to which this Word of the Proviso (*Chantry*) doth not extend; and as to the Words *Obits, &c.* forasmuch as but Part of the Profits was assign'd thereto, altho' the Obit had been found, that the Land was not thereby given to the King.

Turner's Case.
(7) Co. Ent. 275.
pl. 11. Mo. 131.
653, 659, 264.
& Anderf. 100.
2 Siderf. 46.

Trin. 18 Eliz. Rot. 142. In an Information of Intrusion against *Lucas and Collier*, upon the general Issue, a special Verdict was found to this Effect; *Turner* seized of certain Houses in *London* in Fee, of the yearly Value of 4*l.* 6*s.* 8*d.* Anno 3*H.* 6. devised them upon Condition to find an Obit within the Parish of *S. Mary Patens in London*, spending thereat so much as the Devisees would in their Discretions, the Devisees expended only upon the Obit 6*s.* 8*d.* per annum, and it was adjudg'd that the Queen should have the Houses; 1. Because the Appointment was uncertain, altho' the Employment was certain. 2. That all (b) the Use express'd by the Devisor was superstitious: And therefore it was said, If Land to the (c) Value of 5*l.* is devised to find an Obit, spending upon it 3*l.* per annum, altho' a certain Sum is limited, yet forasmuch as the Land is given to find an Obit, and no other Use is express'd, the Land in such Case shall be given to the King, for the Land is given in the same Case wholly (as the Statute speaks) to find an Obit, and therefore within the first Branch of Obits.

(8) Duke 93.

(9) Duke 93.

Colborn & Dale's Case.
(4) Co. Ent. 207.
pl. 11.
Moor 653, 649.
& And. 99, 100.
2 Siderf. 46.
Hern 493.

Trin. 20 Eliz. Rot. 589. inter Colborn & Dale in B. R.

upon Demurrer the Case was such; *Tho. Wells* 12 E. 4. devised divers Houses in *London* of the yearly Value of 24*l.* to his Wife for her Life, the Remainder to the Parson and Churchwardens of *S. Edmonds* and their Successors; and devised that his Wife during her Life, and after her Decease they in Remainder should find a Priest who should perform Divine Service at the Altar in the Chapel of our Lady in the Church of *S. Edm.* for the Souls, &c. and that the same Priest should be aiding and helping at Divine Service in the same Church, and devised, that his Wife during her Life, and those in Remainder after her Death should pay him for his Salary 6*l.* 13*s.* 4*d.* Further he devised that they should find an Obit with 6 Priests and appointed 22*s.* in certain to be employ'd upon it, whereof Part should be distributed amongst the 8 poor of the Trade of *Drapers*, which should come to the said Obit, and could not come. Also he appointed 16*d.* yearly to the Parson of *S. Edm.* for beading of Beads; Every Sunday 3*s.* 4*d.* to the Friars of *S. Augustin* to pray for his Soul; also 4*s.* yearly to be paid to the Preacher at *Paul's* upon good *Friday*; to 3 Preachers of the *Spittle* to commend his Soul to the Prayers of the People 13*s.* 4*d.* Also 3*s.* 4*d.* to the Wardens of the Company of *Sheermen* to distribute amongst the poor Almsmen of the same Trade, to the Intent that those of the Wardens with 8 or more of the said Company upon Warning should come to his Obit: Also he appointed Accounts yearly to be taken, and that the Churchwardens of *S. Edm.* should have the letting and setting of the Lands; and the C. Ws. of *S. M. Wolnaugh* should come yearly and have for their Pains 6*d.* apiece. And the C. Ws. of *S. Edm.* to have 6*s.* 8*d.* And 11*s.* 4*d.* yearly he appointed for the finding of Books, Vestiments and Ornaments of the Chapel, where he appointed his Obit to be celebrated, and that all the Revenue coming of the Premises should be in several keeping separated from other Monies in a Chest, for the Reparation and new building of the Tenements. And it was adjudg'd, that the said Houses were given to the K. by the said Act. In which Judgment these Things were observ'd; 1. That the Devise was to his Wife. 2. That it was a Devise to his Wife for her Life. 3. That every superstitious Use had a certain Sum limited and appointed for the Maintenance of it. 4. That all the Uses were either superstitious, or were depending upon the superstitious Uses, or tending to the Maintenance or Continuance of them: and that was the principal Cause and Reason of the Judgment. *Tr' 30 El. Rot. 709. inter Adams & Stokes* in *B. R.* upon Demurrer the Case was such; *Walter Dunston* devised Lands to the Parson and C. Ws. of *S. Botolph's* upon Condition to find a Priest, and that he should have for his Salary 6*l.* of the Issues and Profits of the Lands. Also he devised yearly for ever 13*s.* 4*d.* to the Prisoners of *Newgate* and *Ludgate*, at the Day of his Death to pray for his Soul, besides the said sole Priest, and the Residue of the Reparation of the Tenements, and to augment the Priests Portion. And it was resolv'd, that the Land was given to the King by the said Act; for the praying for Souls by the said Prisoners;

Antea 105. b
106. a.

Adams & Stokes's
Case. Item. 194.

ADAMS and LAMBERT's Case. PART IV

altho' it was out of Church and Chappel, was superstitious and the Augmentation of the Priest's Maintenance uncertain. And this Resolution was affirmed for good Law by *Popham* Chief Justice and divers others; but Judgment was not entred in the Roll.

Whetston's Case.
4 Leon. 159.
160. Hern 193.
1 Anderf. 100.
Moor 130.

Pascha 2 & 3 Ph. & Mar. Rot. 186. in the King's Bench *Whetstone's Case* was adjudged, That where Lands were given to find an Obit in such a Chappel appointing a certain Sum upon it, and that the Residue should be employed on the Reparation of the Chappel, in which the Obit should be celebrated; And it was adjudged that all the Land was given to the King, for the one depended upon the other. And *Popham C. J.* said, that *Pascha 10 Eliz. Rot. 398.* in an Information in the Exchequer the Case was such; one *Draiton* seised of Lands in *London* in Fee devised them to the Dean and Chapter of *Pauls* upon Condition that they should find two Chaplains to pray for his Soul in a Chappel newly there built by him; and to pay to them for their Salary 13 l. 6 s. 8 d. and to find an Obit, appointing upon it a certain Sum, and to repair the Chappel, and all this was found within the five Years, and it was adjudged against the King; and that agrees with the Opinion in the Case before cited of *the Dean and Chapter of Pauls* before upon the Proviso of this very Act.

Co. Ent. 384.
11. 14.

Partridge's and
Walker's Case.
Moor 693, 694.
Hern. 193.

Hill. 37 Eliz. Rot. 715. inter Partridge & Walker in the King's Bench, the Case was; That one *Hill* devised certain Houses in *London* to the Parson and Churchwardens of the Church of *S. Brides* to find for ever his Anniversary, appointing upon it 20 s. and to pay to the Poor 5 s. 6 d. *in honorem & duplicationem annorum in quibus Christus vixit in terra*: And it was adjudged, that the Land was not given to the King, for the Payment of the 5 s. 6 d. to the Poor *in honorem, &c.* was a good and laudable Use in Commemoration of the Years of our Saviour, the continual Memory of which is most comfortable and necessary for every Christian; But it was agreed in the principal Case at Bar, that if the Devisor had limited by express Words, or by any Words which might imply his Intent to be, that the Devises for the Advancement of his Blood should have the Residue of the Profits, that would be a good Use, and would save the Land; and in such Case the King should have but the Rent. And this Case was very well and at large argued by the Justices; And it was the first Case that *Sir Christopher Telverton* argued after he was constituted Justice of the King's Bench.

2 Rol's Rep. 206.

Hill. 45 ELIZABETHÆ. In Communi Banco.

ACTON's Case.

THE Queen brought a *Quare impedit* against the Bp. of Peterborough, Acton Patron, and Cartmel Incumbent, for the Church of Claycotton being above the yearly Value of 8*l.* The Queen declar'd and made Title to present by Laps *ratione acceptationis duorum beneficiorum*; The Patron and Incumbent sever'd in Pleas, but both their Pleas were to this Effect; Anne Baroness of Mounteagle in her Widowhood retained the said Cartmel to be her Chaplain according to the Statute of 21 H. 8. and he having the said Benefice of Claycotton obtained a Dispensation with Confirmation of the Queen according to the Statute, and pleaded all at large, and that afterwards he accepted the Vicarage of G. &c. and traversed, *absque hoc quod præd' Ecclesia de G. prætextu acceptationis Vicaria de G. virtute Statuti vacavit, &c.* The Queen replied, and confessed the Retainer of him by the said Baroness of Mounteagle, and that he obtained the Letters of Dispensation *prout &c.* But further said, that before the said Cartmel was presented to the said Vicarage of G. the said Baroness of Mounteagle took to Husband Henry Lord Compton one of the Barons of the Realm, and so was Covert Baron, and had lost her Dignity of Baroness of Mounteagle, and afterwards Cartmel the Defendant accepted the said Vicarage and was thereunto admitted, instituted and inducted, and thereupon the Def. demurr'd in Law. And it was objected by the Queen's Council, that the Body of the Act of 21 H. 8. contains a general Prohibition, that if any one has a Benefice of the Value of 8*l.* that he shall not take any other Benefice with Cure, then if this Case is not within the Proviso's, then the first Benefice became void by the Acceptance of the second; and the first Proviso which is material to this Purpose is, *That every Dutcheff, &c. and Baroness being Widows, may have two Chaplains, whereof everyone of them may purchase Licence or Dispensation, to receive, have and keep 2 Benefices, &c.* And the 2 Proviso material to this Purp. is, *Provid. always that every*

Co. Ent. 51 r. pl. 21. Moor 678.

Cap. 13.

Co. Lit. 16. b.

Antea 78. b. Sect. 18.

Sect. 32.

Dutcheffs

Dutchess, &c. and Baroness Widows, which have taken, or hereafter shall take any Husbands under the Degree of a Baron, may take such Number of Chaplains as is above limited to them being Widows, and that every such Chaplain may purchase License, &c. ut supra. And it was strongly urged, that this Case was *Casus omissus*, and out of these Provisoos for divers Reasons: 1. The first ought to be expounded, that the Baroness ought to be a Widow as well at the Time of the Acceptance, as at the Time of the Retainer, for if it shou'd be sufficient that she shou'd be a Widow at the Time of the Retainer, then the said second Proviso would be in vain, for then it wou'd not be material whom she afterwards married, *s. Noble, or Ignoble*; But for as much as the Makers of the Act intended, that if she marry'd after, that then she shou'd be out of the first Proviso, they therefore added the second. And without Question she is out of the second, for that provides only, when such noble Woman marries with one under the Degree of a Baron, and their Reason that they extended the last Proviso when they marry'd under the Degree of a Baron was, because if they marry'd a Baron, or other superior Degree, then the Wife need not have Chaplains, because her Husband might have Chaplains by this Act, which wou'd be sufficient for both, being one Person in Law, and all of one Family. And that the Retainer and the Acceptance ought to concur; It was said if a Noble Man, or Noble Woman retains a Chaplain and dies, the Chaplain can't take two Benefices within this Act, yet the Retainer was lawful, but the Person who made the Retainer ought to continue when the Chaplain accepts his second Benefice: Also it was said, that it was adjudged in the Case of *Ralph Earl of Westmorland*, that where the said Earl retained a Chaplain, and afterwards was attainted of high Treason, and afterwards and during his Life the Chaplain having a Benefice of the Value of 8*l.* accepted a second Benefice with Cure, and it was adjudged that the first Benefice was void, for altho' the Earl was alive, yet the Quality of his Person was altered, for by the Judgment he became ignoble; *vide Stamford*, as if the Treasurer or Comtroller of the King's House, &c. retains a Chaplain, and afterwards is removed out of his Office, now the Chaplain can't accept a 2d Benefice, for now his Quality is altered, and the Cause in Respect whereof he was to have a Chaplain is removed, and so when the Baroness Widow takes Husband, her Quality is altered, for now she is not *suz juris*, but only *sub potestate viri*: And therefore, if the latter Proviso had not been, if such Baroness after the Retainer had married with a Gent. under the Degree of a Baron, her Chaplain could not accept a 2d Benefice, for the Quality of the Baroness by her marriage was altered; and she ought to remain at the time of the Acceptance of the 2d Benefice in the same Quality as she was at the Time of Retainer. 2. It was objected that this Case was out of the

Postea 118. b.

Stanf. Cor.
195. b.
Postea 118. b.

Co. Lit. 16. b.
Co. 53. b.

Proviso, because if a Baron marries a Widow Baroness, in that Case the Baroness can't retain any Chaplain within the said Act, for the Words of the Act are, *Every Baroness being Widow*, which exclude a Feme Covert Baroness, then if she is excluded to retain, by the same Reason her Retainer to have Power by Force of the Act to take a second Benefice is lost by the Marriage, for as much as she now having married with a Nobleman, his Chaplains may perform divine Service to them both, and the Wife of a Nobleman need not have Chaplains by the Judgment of the whole Parliament, for the Act has not made Provision for any such Wives but only for a Baron's Widow, or the Wife of one under the Degree of a Baron who could not have any Chaplain within this Act; But in our Case at the Time of the Acceptance she who retained was the Wife of a Baron, who may have Chaplains by Force of this Act. 3. It was said, that this Act was always construed strictly against Non-Residency, and Pluralities as a Thing very prejudicial to the Service of God, and the Instruction of his People: And therefore if a Bishop is translated to an Archbishop, or a Baron is created an Earl, now he has both these Dignities, and as it is commonly said, *Quando duo (a) jura concurrunt in una persona, equum est etsi essent in diversis*; But yet within this Act he can have but as many as an Archbishop or an Earl may have, for altho' he has sundry Dignities, yet he is but one and the same Person to whom the Attendance and Service shall be done: So if a Baron is made Knight of the Garter, or Warden of the (b) Cinque Ports, he shall have but three Chaplains in all, & sic de similibus: *Quod fuit concessum; Quia difficile est ut unus homo vicem duorum sustineat.* But on the other Part it was argued and resolved by the Court, that in the Case at Bar *Cartmel* after the Marriage might accept the said Vicarage within the Letter and Meaning of the said Act, for without Question the Retainer of *Cartmel* was not determined or countermanded by the said Marriage. And as to that it was said that there are two Manners of Retainers: One at the Common Law, and according to that a Man may have as many Chaplains as he will: Another according to the said Act, and by that he is restrained to a Number; and the first which he retains are his Chaplains according to the said Act, and shall be first (c) preferred, as it was adjudged *Pascha 31 Eliz. in Com' Banco in (d) Skefzing's Case & Mich. 41 & 42 Eliz.* in the King's Bench in (e) *Drury's Case*. And therefore if any Officer allowed by the Statute to have one, two, or more Chaplains, retains a Chaplain, and afterwards is removed from his Office, in that Case the Retainer by the Law remains, but the Retainer upon the Statute is determined, for after the Removal he can't be Non-resident, nor

(a) 7 Co. 14. b.
Calvin's Case
Cawly 209.

(b) Antea. 90. b.

(c) Cro. El. 724.
Antea 90. a.
1 And. 205.
(d) Antea 90. a.
89. b. 1 And.
201. Moor 565.
562. Cro. El.
723, 724, 839.
Jenk. Cent. 272.
273.
(e) Antea 90. a.

accept

(a) Antea 117.b.

(b) Stamf. Cor.
195. b. Antea
117. b.

accept another Benefice: So if an Earl or Baron retains a Chaplain and, before his Advancement, is attainted of Treason, as in the Case of the Earl of (a) *Westmorland*, there the Retainer according to the Statute is determined; and after the Attainder such Chaplain can't accept a second Benefice, because he who is attainted, by his Attainder is a dead Person in Law; and now as (b) *Stamf. pla. Coron.* says from a Nobleman (by the Judgment by which his Blood is corrupted) he is become ignoble, and therefore his Dignity is determined; And altho' the Wife of a Baron during the Coverture can't retain a Chaplain, yet when a Baronefs Widow retains one or two according to the said Proviso, this Retainer according to the Act is the principal Matter; and as long as the Retainer is in Force, and the Baronefs continues a Baronefs, the Chaplains may well accept two Benefices by the exprefs Letter of the Act, for it is sufficient if at the Time of the Retainer the Baronefs was a Widow, for thereby the exprefs Words (*being Widow*) are satisfied: But the Statute doth not provide that she shall be Widow at the Time of the Acceptance, but the Words imply the Contrary, *s.* that she need not continue Widow; for the Words are, *Every Baronefs being Widow may have two Chaplains, whereof every of them may purchase, &c.* so by these Words it is sufficient, if she be a Widow at the Time of the Retainer, and the Power to purchase Licence is annex'd to the Retainer, and there is no Mischief in this Case, for the Number appointed by the Statute shall not be exceeded, and the Act appoints the Baronefs Widow to have two, and her Husband to have three, so that the Intention of the Act is not defrauded; And altho' (as it has been said) the Husband and Wife are but one Person in Law, yet as the Text saith, *Sunt anima due in carne una*, and therefore there is no Reason, that the Retainer of Chaplains which serve for the Instruction of Souls should be determined by the Marriage. Also the last Proviso, When a Baronefs marries one under the Degree of a Baron, was added, because by such Marriage her Dignity was determined, for the Rule is, *Quando (c) mulier nobilis nupserit ignobili, desinit esse nobilis.* But this Rule is to be understood of a Woman who attains Nobility by Marriage, as by the Marriage of a Duke, Earl or Baron, &c. for in such Cases if she afterwards marries under the Degree of Nobility, by such Marriage with one who is ignoble she loses her Dignity which she had attained by Marriage with one of Nobility; for (d) *codem modo quo quid constituitur, dissolvitur*; but if a Woman is Noble, as Dutcheffs, Countesss, Baronefs, &c. by Descent, altho' she marries with one under the Degree of Nobility, yet her Birthright remains, for that is annex'd to her Blood, and *est Character indelebilis*: but in the Case at Bar the Baron by her Marriage with one of Nobil' doth not lose her Dignity of Baron but *potius* augments it. And therof, it's not like any

(c) 2 Inst. 50.
2 Co. 53. b.
Owen 81. Br.
Nofme de Dignity
69. Cawly
247.

(d) Cawly 247.
2 Bulstr. 284.
2 Roll. Rep. 39.
2 Co. 53. b.

Cases which have been put, and the second Proviso explains it, for the Makers of the Act well knew, that afterwards by such Marriage as this is in the Case at Bar, she is a Baroness as she was before, and not in Case as where she marries with one under the Degree of Nobility: To this was added, that the second Proviso doth not provide Remedy when a Baroness Widow retains two Chaplains, and afterwards marries with one under her Degree, but that is left to the general Construction of Law, and provides only that such Baroness after such Marriage may retain two Chaplains, &c. Also when a Baroness Widow retains two Chaplains, and afterwards marries with a Baron, by common Intendment she brings Living and Maintenance with her to support her State, and prefer her Chaplains, and the retaining of her Chaplains can't be a Prejudice to her Husband but *potius* an Honour to him. If a Woman Baroness Widow retains two Chaplains according to the Statute, and afterwards takes one of the Nobility to Husband, and afterwards the Husband dies, the Retainer of these two Chaplains remains; and they without a new Retainer may take two Benefices; for their Retainer was not determin'd by such Marriage; Also for the same Cause so long as they attend upon such Baroness in her House, they shall not be in Danger of Non-residence. And it is to be known, That if a Baron has three Chaplains, and each of them has two Benefices, and afterwards the Baron dies, yet they shall enjoy the Benefices with Cure which were lawfully settled in them before; but altho' he dwells and is resident upon one Benefice, yet he shall be punished for Non-residence upon the other, as 'twas adjudg'd in Parson *Boyton's Case*, and therefore he ought to obtain of the King a *Non obstantie*. So if the Baron is attainted of Treason or Felony, or if any Officer is removed from his Office, & *sc de similibus. Pasch. 44 Eliz.* in a *Quare impedit* brought by the Queen against the Bishop of *Salisbury* and others, it was ruled *per totam Curiam*, that the Earl of *Southampton* being of the Age of 10 Years, and dwelling in the House with the Lord Admiral to whom the Queen had granted his Wardship, might retain and qualifie Chaplains within this Act; for the Words of the Act are general, and yet his Guardian was a Nobleman, and had Chaplains by the said Act allowed him, and the Earl of *Southampton* was under his Custody, and one of his Family, as the Wife was in the Case at Bar.

Hill. 45 ELIZABETHÆ.

In the King's Bench.

DUMFOR'S Case.

Co. Ent. 684.
Pl. 22. Cro. El.
815, 816.

IN Trespafs between *Dumfor* and *Symms*, upon the general Issue, the Jurors gave a special Verdict to this Effect; The President and Scholars of the College of *Corpus Christi* in *Oxford* made a Lease for Years in anno 10 *El.* of the Land now in Question to one *Bolde*, *Proviso* that the Lessee or his Assignees should not alien the Premises to any Person or Persons without the special Licence of the Lessors. And afterwards the Lessors by their Deed anno 13 *El.* licensed the Lessee to alien, or demise the Land, or any Part of it to any Person or Persons *quibuscunque*. And afterwards anno 15 *Eliz.* the Lessee assigned the Term to one *Tubbe*, who by his last Will devis'd it to his Son, and by the same Will made his Son Executor and died. The Son entred generally, and the Testator was not indebted to any Person, and afterwards the Son died intestate, and the Ordinary committed Administration to one who assigned the Term to the Def. The President and Scholars by Warrant of Attorney entred for the Condition broken, and made a Lease to the Pl. for 21 Years, who entred upon the Def. who re-entred, upon which Re-entry this Action of Trespafs was brought, And that upon the Lease made to *Bolde* the yearly Rent of 33 s. 4 d. was reserved, and upon the Lease to the Pl. the yearly Rent of 22 s. was only reserved. And the Jurors prayed upon all this Matter the Advice and Discretion of the Court, and upon this Verdict Judgment was given against the Pl. And in this Case divers Points were debated and resolved. 1. That the Alienation by Licence to *Tubbe* had (a) determin'd the Condit. so that no Alienat: which he might afterw. make could break the Proviso, or give Cause of Entry to the Lessors, for the Lessors could not dispense with an Alienation for one time, and that the same Estate

(a) 1 Rol. Rep.
70, 390. 1 Rol.
422, 471. 2 Bulst.
291. Cro. Jac.
398.

Estate shou'd remain subject to the Proviso after. And altho' the Proviso be that the Lessee or his Assignees shall not alien, yet when the Lessors licence the Lessee to alien, they shall never defeat by Force of the said Proviso the Term which is absolutely aliened by their Licence, in as much as the Assignee has the same Term which was assign- ed by their Assent; So if the Lessors dispense with one Alienation, they thereby dispense with all Alienations af- ter; for in as much as by Force of the Lessor's Licence and of the Lessee's Assignment, the Estate and Interest of *Tubbe* was absolute, it is not possible that his Assignee who has his Estate and Interest, shall be subject to the first Condi- tion: And as the Dispensation of one Alienation is the Dispensation of all other, so it is as to the Persons, for if the Lessors dispense with one, all the others are at Liberty. And therefore it was adjudged *Trin. 28 Eliz. Rot. 256. in Com' Banco inter Leeds (a) & Crompton*, that where the Ld. *Stafford* made a Lease to three upon Condition that they or any of them should not alien without the Assent of the Lessor, and afterwards one aliened by his Assent, and af- terwards the other two aliened without Licence, and it was adjudged that in this Case the Condition being deter- mined as to one Person (by the Licence of the Lessor) was determined in all. And (b) *Popham* Chief Justice denied the Case in 16 *Eliz. Dyer (c) 334*. That if a Man leases Land upon Condition that he shall not alien the Land, or any Part of it without the Assent of the Lessor, and af- terwards he aliens Part with the Assent of the Lessor, that he cau't alien the Residue without the Assent of the Lessor: And conceived, that is not Law, for he said the Condition could not be divided or (d) apportioned by the Act of the Parties, and in the same Case, as to parcel which was aliened by the Assent of the Lessor, the Condition is determined; For altho' the Lessee aliens any Part of the Residue, the Lessor shall not enter into the Part aliened by Licence, and therefore the Condition being determined in Part, is determined in all. And therefore the Chief Justice said, he thought the said Case was false printed, for he held clear that it was not Law. *Nota Reader, Pascha 14 Eliz. Rot. 1015. in Com' Banco*, That where the Lease was made by Deed indented for 21 Years of three (e) Manors, *A. B. C.* rendring Rent, for *A. 6 l.* for *B. 5 l.* for *C. 10 l.* to be paid in a Place out of the Land, with a Condition of Re-entry into all the three Manors for Default of Payment of the said Rents, or any of them; and afterwards the Lessor by Deed indented and inrolled bargained and sold the Reversion of one Houfe and 40 Acres of Land Parcel of the Manor of *A.* to one and his Heirs, and afterwards by another Deed indented and inrolled, bargained and sold all the Residue to another and his Heirs; and if the second Bargainee should enter for the Condition broken or not, was the Question; And it was

(a) 1 Rol. 472.
Cro. El. 816.
Godb. 93. Noy.
32. 4 Leon. 58.
2 Bullstr. 295.

(b) Styles 350.
(c) Dyer 334. 17.
32. Cro. El. 816.
Styles 334.
Moor 291.

(d) Co. Lit.
215. a.

(e) Dyer 305.
306. pl. 75.
Co. 55. b.
Moor 97, 98.

(a) Co. Lit. 215. a. Cro. Jac. 390. 5 Co. 55. b. adjudged, that he should not enter for the (a) Condition broken, because the Condition being entire could not be apportioned by the Act of the Parties, but by the Severance of Part of the Reversion is destroyed in all. But it was agreed, that a Condition may be (b) apportioned in two Cases. 1. By Act in Law. 2. By Act and Wrong of the Lessee. By Act in Law, as if a Man seised of two Acres, the one in Fee, and the other in (c) Borough English, has Issue two Sons, and leases both Acres for Life or Years rendering Rent with Condition, the Lessor dies, in this Case by this Descent, which is an Act in Law, the Reversion, Rent and Condition are divided. 2. By Act and Wrong of the Lessee, as if the Lessee makes a Feoffment of Part, or commits Waste (d) in Part, and the Lessor enters for the Forfeiture, or recovers the Place wasted, there the Rent and Condition shall be apportioned, for none shall take Advantage of his own Wrong, and the Lessor shall not be prejudiced by the Wrong of the Lessee: And the Lord Dyer then Chief Justice of the Common Pleas in the same Case said, that he who enters for a Condition broken ought to be in of the same Estate which he had at the Time of the Condition created, and that he can't have, when he has departed with the Reversion of Part: And with that Reason agrees Litt. 80. b. And vide 4 & 5 Ph. & Mar. Dyer (e) 152. where a Proviso in an Indenture of Lease was, that the Lessee, his Executors or Assigns should not alien to any Person without Licence of the Lessor, but only to one of the Sons of the Lessee; the Lessee died, his Executors assigned it over to one of his Sons, It is held by Stamford and Catlyn that the Son might alien to whom he pleased without Licence, for the Condition as to the Son was determined, which agrees with the Resolution of the principal Point in the Case at Bar. 2. It was resolv'd, that the Statutes of 13 Eliz. cap. 10. & 18 Eliz. cap. 11. concerning Leases made by Deans and Chapters, Colleges and other Ecclesiastical Persons are (f) general Laws whereof the Court ought to take Knowledge, altho' they are not found by the Jurors, and so was it resolv'd between Claypole and Carter in a Writ of Error in the King's Bench.

(b) 3 Bulstr. 154.
Co. Lit. 215. a.

(c) 1 Rol. Rep. 331. Co. Lit. 215. a.

(d) 1 Rol. Rep. 331. Moor 203.

(e) Dyer 152.
Pl. 7. Co. Lit. 215. a. Cro. El. 257. 816.

(f) Antea 76. a.
2 Rol. 465. Yelv. 106. Doct. pla. 337. 338. Noy 124. 2 Brownl. 208. Cro. El. 816. Moor 593. 1 Leon. 306, 307.

Pasch. I Regis JACOBI.

BUSTARD's Case.

MIch. 44 Eliz. in the King's Bench in Trespass, between *Bustard* Plaintiff and *Boulter* Defendant, the Case was such; *Jasper* Dörmer and *Justine* his Wife were seised of the Moiety of the Manor of *Ilbury* to them and to the Heirs of the Body of *Jasper*; *Jasper* levied a Fine thereof to one *Gregory*, who suffer'd a common Recovery, in which *Jasper* was only vouched, and he vouched over the common Vouchee, and it was to the Use of *Gregory* and his Heirs, who thereof enfeoffed *Bustard*, who thereof enfeoffed *Savage* and *Darston* in Fee; and afterwards an Exchange was made by Deed indented between *Savage* and *Darston* of the one Part, and *Bustard* (who was seised in Fee of the fourth Part of the Manor of *Barton*) in the County of *Oxford*, by which Exchange *Bustard* gave the said *Savage* and *Darston* and their * Heirs the said 4 Part of the Manor of *Barton* in Exchange for the Moiety of the Manor of *Ilbury*, which *Moiety Savage* and *Darston* gave *Bustard* and his * Heirs in Exchange for the said fourth Part of the Manor of *Barton*; which Exchange was executed on both Parties: *Savage* and *Darston* demised the fourth Part of the Manor of *Barton* to the Def. for Years, *Jasper* died, *Justine* his Wife entered into the Manor of *Ilbury*, upon which *Bustard* entered into the fourth Part of the Manor of *Barton*; the Def. re-entered, and *Bustard* brought an Action of *Trespass*. And after many Arguments at the Bar and Bench in divers several Terms, it was adjudged for the Pl. and in this Case four Points were resolv'd *per totam Curiam*. I. That in every Exchange lawfully made, this Word (b) *Ex-cambium* implies in itself *tacite* a Condit. and also a Warranty, th' one to give Re-entry, and the other Voucher and Recomp. and all in Respect of the reciprocal Considerat. th' one Land being given in Exchange for the other; But (c) it is a special Warranty, for upon the Voucher by Force of it he shall not recover other Land in Value, but that only which

(a) Cr. El. 902;
217. Yelv. 8.
Moor 665.

Co. Lit. 10. 2.

(b) Co. Lit. 80. b.
51. b. Perk. Sect.
253. 9 E. 4. 21. b.
1 Rol. 814.
Co. Lit. 384. a.
F. N. B. 155. b.
Perk. Sect. 261.
12 H. 7. 2. b.
45 E. 3. 20. b.
(c) Co. Lit. 384.
2. b.

was given in Exchange; for in as much as the mutual Consideration is the Cause of the Warranty, it shall therefore extend only to Land reciprocally given, and not to other Land: And this Warranty runs only in Privy, for none shall (a) vouch by Force of it but the Parties to the Exchange, or their Heirs, and no Assignee; but the Assignee shall (b) rebut by Force of it, altho' the Exchange was without Deed, as appears 3 E. 3 Formedon 44. 2 E. 2. *Cui in vita* 17. * The same Law in Case of Partition: And as it is in Case of Warranty, so it is in Case of Condition, which the Law implies upon the Exchange: And therefore if A. exchanges with B. and B. aliens to C. who is evicted by Title Paramount, C. shall not enter upon the other, for as the Warranty runs in Privy to the Parties to the Exchange and their Heirs, so also the Condition in Law runs also in Privy, and doth not extend to the Assignee, and so none (c) shall have *Contra formam feoffamenti* but the Feoffee or his Heirs, but the Assignee may rebut; *vide F.N.B.* 163. c. 22 H. 6. 50. b. 30 H. 6. 7. a. 10 H. 7. 11. (d) But in the same Case, if A. who did not alien is evicted, he shall re-enter into the Land which he gave in Exchange, altho' B. has aliened it over. 2. It was resolv'd, if A. gives in Exchange three Acres to B. for other three Acres, and afterwards one Acre is evicted from B. in that Case the whole Exchange is defeated, and B. may enter into all his Land; for altho' the Exchange had been good if A. had given but two Acres, or but one Acre or less, yet for as much as all the three Acres were given in Exchange for the others, and the Condition, which was implied in the Exchange, was entire, upon the Eviction of one Acre the Condition in Law was broken, and therefore Entry given into the whole, for it is the Office of the Condition to defeat the whole and not any Parcel, unless the Condition is especially refrained to one Part only as it is not in this Case; And therefore there is not any Difference between a Thing entire as a Manor, and Things several given in Exchange: The same Law of a Partition, as it is also agreed in 13 E. 4. 3. & 42 Ass. 22. *the Earl of Pembroke's Case*, where the principal Case of the Partition is good Law, but the Opinion of *Cavendish* there, that is to say, That altho' an Estate for Life or in Tail is evicted against one Coparcener, that yet the Partition shall remain in Force, * is not Law, as it was resolv'd by the Court in this very Case, *Vide Littleton cap. parceners* 58. b. But in the said Case of the Exchange, if one is impleaded for one Acre, and he vouches the other, and the Demandant recovers, in that Case the Tenant shall recover in Value but according to the Loss: For altho' the Condit. is entire and extends to all, yet the Warranty upon the Exchange may severally extend

to

(a) Co. Lit. 384. b. 174. a.

(b) Co. Lit. 384. b.

* Co. Lit. 173. b. 174. a. 384. a. b.

(c) 9 Co. 34. a. b. 2 Inst. 118.

(d) Perk. Sect. 286, 287. 15 E. 4. 45 Ed. 4. 20, 21. Br. Exchange 12.

Co. Lit. 173. b. 174. a. 4 H. 7. 6. a. b.

1 Co. 86. b.

Yelv. 8. Co. Lit. 174. a. * Co. Lit. 174. a. 173. b.

Lit. Sect. 262.

to Part; and there is great Difference between Warranty in Law upon Exchange, and Warranty in Law upon Partition, as to Recovery in Value; for in Case of Exchange, he who vouches shall recover in Value according to the Value which he lost, but so it is not in the Case of Partition: For if a Man is seised of 6 Acres in Fee, every one of equal annual Value, and dies, having Issue two Daughters, and upon Partition each has three Acres, and afterwards one Sister is impleaded for 1 Acre by one who has Title paramount, and prays in Aid of her Coparcener, she shall not recover an Acre, but half an Acre, so that each of them shall have an equal Part; for inasmuch as both claim by Descent, which is an Act in Law, and by the Law each of them ought to have an equal Part of the Inheritance of her Ancestor, for this Cause she shall recover in Value but the Moiety which she lost, so that the Loss shall be equal. So if a Man is seised in Fee or in Tail of 3 Acres, each of equal yearly Value, and dies, the Heir endows the Wife of the third Acre, and afterwards the Wife is impleaded by one who has Title paramount, and she vouches the Heir; now she shall not recover in Value according to that which she lost, but the 3 Part of the 2 Acres which remain, for by the Law she ought to have in Dower the 3 Part, and now upon the Matter she is to have in Dower but the 3 Part of the 2 Acres, as appears by the Book in 5 E. 3. *Voucher* 249. where the principal Case was, *Rob. de Paris* Great Grandfather, *Stephen de Paris* Grandfather, *Ro. de Paris* Father, and *Ro. de Paris* the Son; *Ro.* the G. Grandfather having to Wife *Maud* seised of certain Land in Fee, gave it to *Stephen* and the Heirs of his Body, who died; *Ro.* the Son of *St.* endow'd *Margery* the Wife of *St.* of the 3 Part of the whole, and afterwards *Ro.* the Great Grandf. dy'd, and *Ro.* the Father died, *Maud* late the Wife of the Gr. Grandf. brought a Writ of Dower against *Marg.* Wife of *St.* and she vouch'd *Ro.* the Son of *Ro.* who had the Reversion, and there the Question was, of how much *Margery* should have in Value? And by some, she shall only have Dower, having regard to the two Parts which remain, because the Dower which *Maud* the Wife of the Gr. Grandf. demanded, is higher and elder than the Dower of *Margery* the Wife of the Grandf. And notwithstanding the Gr. Grandf. surviv'd *Stephen*, and the Wife of *St.* in the Life of *Rob.* the Gr. Grandf. was lawfully endow'd; at which Time *Maud* could demand nothing, yet when her Husband dy'd, her Title of Dower is more worthy. And some held the contrary, *s.* That the Wife should recover in Value according to her Loss; and a Difference was taken between Dower of the Wife of an Heir and of the Wife of a Purchasor; for if there be Grandfather, Father, and Son, and the Grandf. dies, and afterwards the Father dies, and the Son endows the Wife of the Father, against whom the Wife of the Grandfather brings Dower, she

Co. Lit. 174. a.
384. a.
2 Roll. 773.

Co. Lit. 311. a. b.

Co. Lit. 31. a. b.

BUSTARD'S Case. PART IV.

she shall not recover over in Value, because the Dower of the Wife of the Grandf. toll'd in Law the Descend as to the Freehold, and she shall be in of the Estate of her Husband, and *per consequens* after the Death of the Wife of the Grandf. the Wife of the Father shall not be endow'd of the Part assign'd to the Grandmother for her Dower, for now in Judgment of Law the Father had but a Reversion of that Part expectant upon an Estate for Life, & *ideo, Dos de dote peti non debet.* But in that Case the Gr. Grandf. made a Gift in Tail to *Stephen*, so that *Maud* demanded Dower against *Margery*, who was the Wife of a Purchasor, and altho' *Maud* recover'd Dower against *Margery*, yet if *Margery* surviv'd her, she should re-enter; for Dower toll'd the Estate which by Law descended, but not the Estate acquir'd and gain'd by Purchase, and so was it adjudg'd, and there *Margery* recover'd generally to the Value which she lost: So in Case of Exchange, each Party is a several Purchasor, and each warrants the whole to the other, and therefore he shall recover to the Value which he loses. It was resolv'd, that as when the whole Estate in part is evicted, the whole Exchange is defeated; So in the principal Case, when the Estate of Freehold for the Life of *Justine*, which is but Parcel of the Estate is evicted in all the Lands, or in Part, by that the whole Exchange may be defeated by Force of the Condition in Law, for altho' a Reversion expectant upon an Estate for Life may be given in Exchange for Land in Possession, yet when *Savage* and *Darson* in the principal Case were seised of the Moiety of the said Manor of *Ilbury* in their Demesne as of Fee, and gave it in Possession to *Bustard* in Exchange, *ut supra*, when *Justine* entred and evicted an Estate for Life, *Bustard* might enter into the whole Land which he gave in Exchange, for the whole Estate which was given to him was the Consideration that he departed with his Land, and therefore when any Estate of Freehold is evicted from him by Entry or otherwise, he may by Force of the Condition in Law enter into the Land given by him: So if he in Reversion in Fee disseises his Lessee for Life, and gives this Land in Exchange to another for other Land, and afterwards the Lessee for Life enters, now may the other enter into his Land, because the whole Exchange is defeated; but if *A.* has the Reversion in Fee of an Acre of Land expectant upon an Estate for Life, makes an Exchange with *B.* by Deed indented, and gives this Acre by the Name of an Acre of Land, and not by the Name of the Reversion in Exchange for another Acre; in this Case altho' *B.* expects to have the Acre so given him, in Possession, yet in this Case (forasmuch as nothing pass by the Gift of the Acre of Land but the Reversion) the Warranty or the Condition can't by the Law extend to more than pass by the Exchange, for they are incident and annexed to the Estate which is given, and can't extend to the Freehold which was in the Lessee; and if the Law should be otherwise, great

Co. Lit. 31. b.

Co. Lit. 174. a.
Yelv. 8.

1 Roll. 815.

1 Roll. 815.

Co. Lit. 174. a.
Cr. El. 902.

Co. Lit. 50.

Mischief would ensue, for if Exchange is made of divers Manors, and peradventure divers Parcels of them are in Lease for Life, in this Case, if the Exchange should be void because it was made as of a Manor in Possession, it would avoid all such Exchanges, which would be mischievous, and there can be no Mischief on the other Part; for when the Tenants for Life are in Possession of the Land, it shall be accounted the Laches and Folly of the Purchaser, if he did not know it either by Survey or other Intelligence. But in the principal Case, by the Fine and Recovery, and other Estates made, the Estate which *Justine* had was divested, and she had but a Right, so that *Savage* and *Darson* who gave it in Exchange had an Estate in Fee Simple in Possession, to which the Warranty and Condition in Law upon the Exchange, was annex'd. 4. It was resolv'd, that altho' *Bustard* had Notice of the Right of *Justine* at the Time of the Exchange, yet it was not material, but that afterwards by her Entry the Exchange shall be defeated, for peradventure it was one of the Causes that he would not purchase *Ilbury* absolutely, but by way of Exchange, so that upon Eviotion he shall have his own Land again: And *Coke* the Attorney-General, and *Tanfield* and *Daston* were of Council with the Defendant, and *Godfrey*, *Telverton* and others with the Plaintiff.

Paschæ I Regis JACOBI.

In the King's Bench.

Beverley's Case of Non compos mentis.

IN a Bill depending in the Court of Requests between *Snow* Plaintiff, and *Beverley* Defendant, the Matter was; That *Snow* had made a Bond to the Defendant in 1000*l.* and in the said Court would be relieved, because at the Time of the making of the said Bond, he was *Non compos mentis*; and this Term I mov'd the Court of King's Bench to have a Prohibition to stay the said Suit in the Court of Requests, because the Matter was not determinable there. And upon this Case two Points upon Argument and good Consideration were unanimously resolv'd *per totam Curiam*, 1. That every Deed, Feoffment, or Grant which any Man *Non compos mentis* makes is avoidable, and yet shall not be avoided by himself, because it is a Maxim in Law, that no Man of full Age shall be in any Plea to be pleaded by him, receiv'd by the Law to (a) stultify himself, and disable his own Person, as appears by *Littleton, lib. 2. cap. Discents fol. 95.* and therewith agree 39 *H. 6. 42. b. 5 E. 3. 70. & 35 Ass. 10.* And there another Cause is given, *s.* because when he recovers his Memory, he can't know what he did when he was *Non compos mentis*. If the Common Law had given a Writ of *Non compos mentis* to him who has recover'd his Memory after Alienation, certainly the Law would have given him Remedy for the Maintenance of himself, his Wife, Children and Family, altho' he recover'd not his Memory, but continu'd *Non compos mentis*. And it must be known, That this Disability to disable himself as to some Persons is personal, and extends only to the Party himself, and as to other Persons is not personal, but shall bind them also: And as to that know that there are 4 Manner of (b) Privities, *s.* Privit. in Blood, as Heir: 2. Privity in Representation, as Executors

(a) Jenk. Cent. 40
F. N. B. 202. D.
1 Roll. 2.
Br. Fairs 62.
Fitz. Issue 53.
Cr. El. 398, 622.
Godb. 302.
Co. Lit. 247. a. b.
Br. Dum fut inf.
etatem 3.
Br. Entre con-
geable 47.
Lit. 95. a. b.
Lit. Sect. 405.

(b) 3 Co. 23. 2.
3 Co. 42. b.
Co. Lit. 271. a.
1 Jones 32.
3 Inst. 516, 517.

or Administrators, who as *Littleton* saith fol. 77. b. represent the (a) Person of the Testator or Intestate, 2 *Mar. Dyer* 112. agrees. 3. Privity in Estate, as Donee in Tail, the Reversion or Remainder in Fee, &c. 4. Privity in Tenure, as Lord by Escheat: And two of them which are Privies only may disable him who was *Non comp' men'*, and shall avoid his Deeds, Grants or Feoffments, and 2 not. For Privies in Blood may shew the Disability of the Ancestor, and Privies in Representation the Infirmitie of the Testator or Intestate; but neither Privity in (b) Estate, nor Privity in Tenure shall do it: And therefore if Donee in Tail being *Non comp' mentis* makes a Feoffment in Fee, and dies without Issue, he in Reversion or Remainder shall not enter or take Advantage of the Disability of the Donee: The same Law of Lord by Escheat, if his Tenant being *Non comp' men'* makes a Feoffment in Fee, and dies without Heir, he shall not avoid it: But there are some Acts done by a Man *Non comp' men'* which none of them shall avoid, and therefore if he levies a Fine, or suffers a Recovery, (c) or acknowledges a Statute or Recognisance, neither his Heirs nor his Executor shall avoid it, for these are Matters of Record which shall not be avoided by a bare Averment of *Non comp' men'* for the Inconvenience which may thence ensue; Also such Averment is against the Office and Dignity of the Judge, for he ought not to take any Confessors of a Fine or Recognisance of him who is *Non comp' men'*, 18 E. 2. *Fines* 120, 17 *Aff.* 17. 17 E. 3. — 1 *Mar. Tit. Dum suit inf' atal* 7. 31 E. 3. *Saver Defauld* 57. 2. It was resolv'd, that it being against an expresse Maxim of the Common Law, that the Party shall not (d) disable himself, that he shall not have for it Relief in any Court of (e) Equity, for that would be in Subversion of a Principal and Ground in Law, *qd' nota.* And *Coke* the K's Attorney was of Counsel with *Beverley*, and *Herle* the King's Serjeant with *Snow*. *Nota Reader*, that every Act which a Man *Non compos* doth, either concerns his Life, his Lands, or his Goods; Also every Act which he doth is either in *pais*, or in a Court of Record: All Acts which he doth in a Court of Record, either concerning his Lands or Goods shall bind himself, and all others for ever; All Acts which he doth concerning his Lands or his Goods in *pais*, in some Case shall bind himself only during his Life, and in some Case shall bind for ever (as has been said.) But as to his (f) Life, the Law of *England* is, that he shall not lose his Life for Felony or Murder, because the Punishment of a Felon is so grievous, *s. i.* To lose his Life. 2. To lose his Life in such odious Manner, *s.* by hanging, for he shall be hanged between Heaven and Earth as unworthy of both. 3. He shall lose his Blood as to his Ancestry (for he is as a Son of the Earth without any Ancestor) and as to his

(a) Lit Sect. 337.
Co. Lit. 208. b.
209. a.

(b) 8 Co. 43. a.
1 Rolls Rep. 401.
442. 3 Bullt. 172.
2 Inst. 483.

(c) Br. Fines lev.
&c. 75. 2 Inst. 483.
12 Co. 123. 124.
Cr. El. 187.
Co. Lit. 247. a.
Perk. Sect. 24.

(d) Jenk. Cent. 40.
Cr. El. 398. 622.
F. N. B. 202. d.
1 Rolls 2.
Br. Fines 62.
Fitz. Issue 53.
Godb. 302.

Co. Lit. 247. a. b.
Br. Dum suit inf' atal. 3.
Br. Entry congeable 47.
Lit. Sect. 405.

Lit. 95. a. b.
(e) 1 Rol. Rep. 219
(f) 2 Rol. Rep. 547

Hob. 134.
Plow. 19. a.
2 Rol. Rep. 324.
Co. Lit. 247. b.
21 H. 7. 31. b.
Br. Corone 61.
Stamf. Cor. 16. b.
Fitz. Cor. 351.
412. 414.

Went. 302.
Godb. 316.

(g) Co. Lit. 41. a.
1 Rol. Rep. 186.
187. 3 Inst. 210.
211. Plow. 387. b.
Stamf. Cor. 182.
a. b.

his Posterity also, for his Blood is corrupt, and he has neither Heir nor Posterity. 4. His Lands. 5. His Goods; and in such Case the King shall have *Annum, diem, & vastum*, to the Intent that his Wife and Children shall be ejected, his Houses pulled down, his Trees eradicated, and subverted, his Meadows (*a*) plough'd, and all that he has for his Comfort, Delight, or Sustainance, wasted and destroy'd, because he has in such felonious Manner offended against the Law; and all this was, *Ut (b) pena ad paucos metus ad omnes perveniat*: But the Punishment of a Man who is depriv'd of Reason and Understanding can't be an Example to others. 2. No Felony or Murder can be committed without (*c*) a felonious Intent and Purpose; *Et ideo dict' est feloniam, quia fieri deb' felileo animo*: But *Furiosus non intelligit quid agit, & animo & ratione caret, & non multum distat a brutis*, as *Bracton* saith, and therefore he can't have a felonious Intent, *Vide 21 H. 7. 31. 26 Ass. 27. F. N. B. 202. D. Stamf. Pl. Coron. 16. b.* Also for the same Reason, *Non compos mentis* can't commit Petit Treason, as if a Woman *Non compos mentis* kills her Husband, as appears *12 H. 3. Forfeiture 33.* But in some Cases *Non compos mentis* may commit High (*d*) Treason, as if he kills, or offers to kill the King, it is High Treason, for the King *est caput & salus Republica, & a capite bona valetudo transi in omnes*; and for this Reason their Persons are so sacred, that none can offer them any Violence, but he is *Reus criminis lese Majestatis, & pereat unus ne pereant omnes*. And it must be known, That there are 4 * Manner of *Non compos mentis*: 1. Ideot or Fool natural: 2. He who was of good and sound Memory and by the Visitation of God has lost it: 3. *Lunaticus, qui gaudet lucidis intervallis*, and sometimes is of good and sound Memory, and sometimes *Non compos mentis*: 4. By his own Act, as a Drunkard; and it has been said, that there is great Difference between an Ideot *a nativitate*, and he who was of sound Memory, and becomes by the Visitation of God, of unsound Memory; for an Ideot is known by his perpetual infirmity of Nature *a nativitate*, for he never had any Sense or Understanding to contract with any Man, but he who was of good Memory and Understanding and able to make a Contract, and afterwards becomes by Infirmity or Casualty of unsound Memory, is not so well known to the World as an Ideot natural. Also an Ideot in an Action brought against him shall appear in proper (*e*) Person, and he who pleads best for him shall be admitted, as appears in *33 H. 6. 18. b.* Otherwise it is of him who becomes *Non compos mentis*, for he shall appear by Guardian if he is within Age, and by Attorney if he is of full Age, but yet as to Estates or Gifts made by them, they themselves by any Plea that they can plead shall not avoid them, no less the Ideot than he

(a) Co. Lit. 294. b

(b) 3 Inst. 4. 6.

(c) Plow. 19. a.
Hob. 134.
3 Rolls 547.

(d) 2 Rolls R. 324
Dalt. Just. 330.
Halespl. Cor. 10.
3 Inst. 6.
4 Godb. 316.

* Co. Lit. 247. a.

(e) Co. Lit. 135. b.
F. N. B. 9. 27.
Br. Ideot 1.
Stamf. Prærog.
36. a.

who becomes of unsound Memory ; and be the Feoffment or Gift made by them in Person or by Attorney, they themselves shall never avoid it either by Entry or by Action ; for it appears by the said Maxim, that they can't stultify (a) or disable themselves : But if they shall avoid Things which they do by Attorney, they themselves ought to shew that they were then Ideots, or of unsound Memory : But yet as to others, there is a great Difference between an Estate made in Person and by Attorney ; for if an Ideot or *Non compos mentis* makes a Feoffment in Fee in Person, and dies, his Heir within Age, he shall not be in ward, or if he dies without Heir, the Land shall not escheat as is aforesaid : But if the Feoffment is made (b) by Letter of Attorney, altho' the Feoffor shall never avoid it, yet after his Death as to all others in Judgment of Law the Estate was void, and therefore in such Case if his Heir is within Age he shall be in ward, or if he dies without Heir the Land shall escheat, and that is the true Reason of the Books in 7 H. 4. 5. b. & 7 H. 4. 12. And like the Case of an (c) Infant, if he makes a Feoffment in Person, if he dies without Heir the Land shall not escheat, but otherwise if it was made by Letter of Attorney, but the Infant himself shall avoid it, but so shall not the others ; but Acts done by Matter of Record, as Fines, * Recoveries, Judgments, Statutes, Recognizances, &c. shall bind as well the Ideot, as he who becomes *Non compos mentis*, (d) 31 E. 3. *Saver default* 37. 1 Mar. *Dum fuit infra atatem* 7. Also of a Lunatick, all Acts which he doth during his Lunacy are equivalent to Acts done by an Ideot, or he who is utterly *Non compos mentis* ; but Acts done by him *inter lucida intervalla*, when he is of sound Memory shall bind him. Lastly, altho' he who is (e) drunk, is for the Time *Non compos mentis*, yet his Drunkenness does not extenuate his Act, or Offence, nor turn to his Avail, but it is a great Offence in itself, and therefore aggravates his Offence, and doth not derogate from the Act which he did during that Time, and that as well touching his Life, his Lands, his Goods, or any In Case other Thing that concerns him : When and in what Cases Laches shall prejudice an Ideot or *Non compos mentis*, some have taken a Difference between a Bar of his Right, and a Bar of his Entry, for in Case of Bar of his Right, his Laches shall not prejudice him, but in such special Case if he becomes of unsound Memory, he shall shew that he was *Non compos mentis* ; as if a Man *Non compos mentis* is disseised, and the Disseisor levies a Fine, in this Case at the Common Law, altho' the Year and Day are past, yet he who was *Non compos mentis* shall not be thereby bound, but he may well enter, and that they say is proved by the Statute *de modo* (f) *levandi fines*, made anno 18 E. 1. which is but a Declaration of the Common Law, f. that a Fine is so high

(a) Jenk. Cent. 40
Cr. El. 398, 622.
F. N. B. 202. d.
1 Rol. 2. Antea
123. b. Br. Faits 62
Fitz. Issue 53.
Godb. 302.
Co. Lit. 247. a. b.
Br. Dum fuit in-
fra atatem 3.
Br. Entry con-
geable 47.
Lit. Sect. 405.
Lit. 95. a. b.
(b) F. N. B. 202. c.
Br. Feoffments 8.

(c) 8 Co. 42. b.
7 Co. 7. b.
2 Inst. 483.
Dy. 10. pl. 38.
49 E. 3. 13. a.
39 H. 6. 42. b.
7 H. 5. 9. b.
3 Bullstr. 272.
Antea. 124. a.
Cr. El. 187.
Co. Lit. 247. a.
Perk. Sect. 24.
2 Inst. 483.
Br. Fines leviz.
&c. 75. 12 Co.
123. 124.
(d) Antea 124. a.

(e) Co. Lit. 247. a
Plow. 19. a.

(f) Co. Li. 26. 2. b.
Plow. 359. b.
2 Inst. 510, 514.

a Bar, and of so great Force, and of so strong a Nature in itself, that it bars not only those who are Parties and Privies to the Fine and their Heirs, but all other People of the World who are of full Age, out of Prison, and of good Memory, and within the four Seas the Day of the Fine levy'd, if they put not in their Claim by their Action or Entry in the Country within the Year and the Day, by which it appears, that no Laches of a Man *Non compos mentis* shall bar him of his Right. Also it appears by the Statute of 4 H. 7. cap. 24. that in such Case, if a Man levies a Fine with Proclamations, and at the Time of the Fine levy'd he who has Right is *Non compos mentis*, and afterwards he recovers his Memory, in this Case he ought to pursue his Action or make his Entry within 5 Years, after he becomes of sound Memory, and in such Case in pleading he shall shew that at the Time of the Fine levied, he was *Non compos mentis*, and all the special Matter; but if he who has such Right, is an Ideot, or *Non compos mentis*, and never recovers his Memory, the Heir may have his Action, or make his Entry when he will, for he is excepted out of the Body of the Act, and is not bound to make any Entry, or bring his Action within any Time, but the Party himself if he recovers his Memory. The same Law if he who is beyond Sea at the Time of the Fine levied and dies, there his Heir may enter or bring his Action when he will, and in such Case the Lord by Escheat shall take Advantage of *Non compos mentis*, Infancy, Imprisonment, or being beyond Sea, of his Tenant: For if there are Lord and Tenant, and the Tenant is disseised, and the Disseisor levies a Fine, the Disseisee being then within Age, or *Non compos mentis*, or in Prison, or beyond Sea, and afterwards the Disseisor takes back an Estate to himself in Fee, and afterwards the Disseisee within Age, or *Non compos mentis*, or beyond Sea, or in Prison, dies without Heir, the Lord by Escheat shall take Advantage of every of them against his Disseisor. So if a collateral Warranty descends upon one *Non compos mentis*, which he might have avoided by Entry: But an Ideot or *Non compos mentis* by their Laches shall be barr'd of their Entry, and therefore if they are disseised, and the Disseisor dies seised, it shall toll their Entry, but after their Death their Heir may enter, and take Advantage of the Infirmity of their Ancestor, and his Laches which shall prejudice himself shall not prejudice his Heir of his Entry, and all this appears by *Littleton lib. 3. c. Descents fol. 95.* For *Littleton* saith, No Laches can be adjudg'd by the Law in him who has no Discretion in such Case, *s. having* Regard to his Heir, and so is the Difference. As to that which is commonly objected, that the Civil Law in this Point is grounded upon greater Reason than the Common Law, for by the Civil Law all Acts which Ideots or *Non comp' mentis* do without their Tutor are utterly void, and this seems to some more reasonable than the Com. Law, because he who is an Ideot

2 Inst. 520.
Plowd. 366. a.

Lit. Sec. 405.

or *Non compos mentis* wants Discretion and Understanding, and that comes by the Act and Visitation of God; therefore they say (God forbid) that his Acts or Laches during that Time should bind him: Others conceive that the ancient Common Law agrees with the Civil Law in this Case; for *Bracton lib. 3. fol. 100* saith, *Furiosus autem stipulari non potest, nec aliquid negotium agere, quia non intelligit quod agit*: And therefore it seems unreasonable that Acts done by them who have no Discretion nor the Use of Reason, *Quia* (as *Bracton* saith) *non multum distant a brutis qui ratione carent*, should bind them;

and therefore it is (as is commonly said) a great Defect in Law, that no Tutor is assign'd to them by Law, who may protect them, and principally their Inheritance: As to that it must be known, that the Law of England has provided for them a Tutor, and has made Provision for the Preservation of their Inheritance, and their Goods also, and therefore in the Case of an Ideot, or Fool natural, for whom there is no Expectation but that he during his Life will remain without Discretion and Use of Reason, the Law has given the Custody of him, and of all that he has to the K. who (as *F. N. B. 232.* says) is bound of Right by his Laws to defend his Subjects, and their Goods and Chattels, Lands and Tenements; and because every Subject is in the K's Protection, an Ideot who can't defend or govern himself, nor order his Lands and Tenements, Goods and Chattels, the K. of Right ought to have him, and to order him his Lands, Goods and Chattels, and this, it appears, was the Common Law for *Britton fo. 16.* who wrote *anno 5. E. 1.* saith, That if any Heir is a Fool natural, by which he is not able to demand and keep &c. his Inheritance, that such Heirs of whomsoever they hold Male or Female remain in the Custody of the K. with all their Inheritance; and thence it follows that the Statute of *Prærog. Regis cap. 9.* made in *17 E. 2.* long Time after *Britton* wrote, was but a Declaration of the Common Law, and therewith agrees *18 E. 3. Scire facias 10.* where it appears by the said Statute *Prærogativa Regis; quod Rex habebit custodiam terrarum fatuorum naturalium, capiendo exitus earundem sine vasto & destructione, & inveniet eis necessaria sua, de cujuscunque feodæ terre ille fuerint, & post mortem eorundem reddat eam relictis hereditibus, ita quod nullatenus per eosdem fatuos alienentur, nec quod eorum heredes exheredentur*: Upon these Words I observe divers Things. 1. That the Law gives the K. but the Custody of the Lands of the Ideot, that altho' it continues during the Life of the Ideot, yet having but the Custody, the K. has not the Freehold in him, but the Freehold is in the Ideot, for the Statute says, *Quod post mortem eorum reddat eam relictis hereditibus*, and that appears also in *17 E. 3. 11. & 13 E. 3. Saver default 37.* 2. Altho' the Statute says, *Custodiam terrarum*, yet the K. shall have as well the Custody of the Body, and of their Goods and Chattels, as of the Lands and other Hereditaments, and as well those which he has by Purchase, as those which he

Co. Lit. 135. b.
Stamf. Prærog.
33. b.

Co. Lit. 247. a.

cap. 9. made in *17 E. 2.* long Time after *Britton* wrote, was but a Declaration of the Common Law, and therewith agrees *18 E. 3. Scire facias 10.* where it appears by the said Statute *Prærogativa Regis; quod Rex habebit custodiam terrarum fatuorum naturalium, capiendo exitus earundem sine vasto & destructione, & inveniet eis necessaria sua, de cujuscunque feodæ terre ille fuerint, & post mortem eorundem reddat eam relictis hereditibus, ita quod nullatenus per eosdem fatuos alienentur, nec quod eorum heredes exheredentur*: Upon these Words I observe divers Things. 1. That the Law gives the K. but the Custody of the Lands of the Ideot, that altho' it continues during the Life of the Ideot, yet having but the Custody, the K. has not the Freehold in him, but the Freehold is in the Ideot, for the Statute says, *Quod post mortem eorum reddat eam relictis hereditibus*, and that appears also in *17 E. 3. 11. & 13 E. 3. Saver default 37.* 2. Altho' the Statute says, *Custodiam terrarum*, yet the K. shall have as well the Custody of the Body, and of their Goods and Chattels, as of the Lands and other Hereditaments, and as well those which he has by Purchase, as those which he

Stamf. Prærog.
33. b. 34.
Co. 170. 2.
2 Inst. 14.
1 And. 27.
Dyer 25, 26. pl. 164
Moor. 4.

Stamf. Pr. 35. b.

Co. Lit. 2. b.

has as Heirs by the Common Law. 3. That he ought to be an Ideot *a nativitate*, *s. fatuus naturalis*, and not by Accident or Infirmitie, 4. That no Feoffment, Gift, Lease or Release that an Ideot can make of his Inheritance, but may be avoided during his Life, which appears by these Words, *ita qd nullatenus per eosdem fatuos alienentur, nec qd eorum heredes exheredentur*: Suppose then that an Ideot above the Age of 21 Years, makes a Feoffment in Fee of his Inheritance, if you ask how and in what Manner it may be avoided during his Life? I answer, that if it is found by Office at the

(a) Jenk. Cent. 40
Co. Lit. 247. a.
8 Co. 170. a.
2 Rol. Rep. 337.
Godb. 302.
F. N. B. 202. c.
Stamf. Prarog.
34. b.
Antea 56. b.
Br. Alienation 14.
Br. Ideot 2.
Br. Travers de
office 22.
Antea 24.
Br. Feoffment de,
&c. 63.

(a) King's Suit, that he was Ideot *a nativitate*, and that he has alien'd his Lands, then upon a *Scire facias* against the Alienees the Land shall be seised into the K's Hands, and thereby the Inheritance shall be revested in the Ideot, 18 E. 3. *Sci' fac' 10. 32 E. 3. Sci' fac' 106. 50 * Ass. 2.* For the Statute says, *qd post mortem eorum reddat eam rectis heredib'*, which the K. can't do, neither can the K. have the Possession of the Land to his own Use, unless by the Office and the Seifure, such Conveyance made by the Ideot be destroy'd, and that doth not impugn the said Maxim of the Common Law. For in this Case the Ideot in no Plea that he can plead shall disable (b)

† 8 Co. 170. a.
(b) Jenk. Cent. 40
Cr. El. 398, 622.
F. N. B. 202. d.
2 Rol. 2.
Br. fairs 62.
Fitz. Issue 53.
Godb. 302.
Co. Lit. 247. a. b.
Br. Dum fuit infra etatem 3.
Br. Entry congeable 42.
Lit. Sect. 405.
Lit. 95. a. b.
(c) Cr. El. 187.
Co. Lit. 247. a.
Perk. Sect. 24.
Br. Fines levies &c. 75.
12 Co. 123, 124.
2 Inst. 483.
(d) Hard. 434.
Stiles 21.

or stultify himself: But all this is found by Office by the Inquisition and Verdict of 12 Men at the K's Suit, who are not concluded to speak the Truth, and such Office when it is found, shall have † Relation *a tempore nativitatis*, to avoid all mean Acts done by the Ideot, as Feoffments, Releases, &c. and therewith agree 23 E. 3. &c. *Sci' fac' 106. & Stamf. Prarog. 34. b. F. N. B. 202. E.* But notwithstanding the Words of the said Act are general and emphatical *nullaten' alienen'*, yet if he aliens by Fine, (c) or Recovery, it shall bind him, as has been said, for the Cause aforesaid, and so after such Office found all Gifts made by him of his Goods or Chattels, and all Bonds made by such Ideot are utterly void, and after such Office found if the Ideot be sued in any Action, upon any Bond or Writing that he has made, the K. by his Writ (so long as the Office stands in Force) reciting the Office shall send a *Super sedes* to the Justices where the Suit is commenc'd: But the K. shall not have the Custody of the Land which an Ideot holds by (d) Copy, for that is but an Estate at Will by the Common Law, and if the King should have the Custody of it, it would be a great Prejudice to the L. of the Manor; but yet an Alienation made by an Ideot of his Copyhold after Office found shall be avoided, *vide 13 Eliz. Dyer 302.* And that the K. shall have the Protection of the Goods (e) and Chattels of an Ideot as well as of his Lands, appears by *F. N. B. 232. b.* where he says, that if an Ideot who can't defend, or govern himf. nor order his Lands, Tenements, Goods, and Chattels, the K. of Right ought to have him in his Cust. and to protect him and his Lands, Goods and Chattels; and this appears also by the Writ in the *Reg. de Ideota inquirendo*, where it is said,

(e) Stamf. Pr. 36. a

(f) F. N. B. 232. b.

Quia (f) accop' qd' F. de B. fatuus & Ideot' exist' ita qd' regim'

sui ipsius terrarum, tenementorum, bonorum & catallorum suorum non sufficit, & quod ipse in fatuitate sua magnam partem terrarum & tenementorum suorum alienavit, & etiam magnam partem bonorum & catallorum suorum dissipavit in exheredationem suam, & nostri prejudicium manifestum, nos indemnitate ipsius in hac parte prospicere volentes, &c. By which it appears, that by the Common Law the K. shall have as great Protection of the Goods and Chattels of an Ideot, as of his Lands, and that as well the Consumption of his Goods and Chattels, as the Alienation of his Lands is to be remedy'd and redress'd by the K. to whom the Law gives his Custody and Protection. And as after Office found he can't alien, give, &c. so Alienations, Gifts, &c. made before Office found, shall be avoided after Office thereof found, as is aforesaid, for no Laches shall be accounted in the King, nor no Prejudice thereby accrue to the Ideot for not suing of the Office before the Feoffment or Gift. But if the Ideot dies before Office found, after his Death no Office can be found, for the Words of the Writ are, *Et ipsum viis & modis quibus super statu suo melius poteritis informari circumspicite examinaretis, &c.* which can't be done when he is dead, and without Office the King can't be entitled, 16 E. 3. Livery 30. and then the former Differences as to his Lands and Goods hold. The same Law if a Man who was of sound Memory becomes *Non compos mentis*, and afterwards aliens his Land, or Goods or Chattels, and afterwards by Office at the King's Suit [it is found, that he was *Non compos mentis*, and that he has aliened, &c. the King shall protect him who can't protect himself, as is aforesaid, and shall take the Profits of his Lands, and of all that he had (which the K. could not do if his Alienation or Gift should stand) and therewith maintain him and his Family, but the King shall not take any Part of the said Profits to his own Use; and all this appears by the Statute of *Prærogat. Reg. cap. 10.* which was but a Declaration of the Common Law; *Item Rex providebit, &c. Et nota* that the said Words of *F. N. B. 232.* that the K. is bound of Right by his Laws to defend his Subjects, and their Goods and Chattels, Lands and Tenements, extend as well to *Non compos mentis*, as to an Ideot; but in Case of *Non compos mentis*, the K. has not any Interest in the Lunatick (as he has in the Ideot) because the Lunatick may recover his Memory which he has lost, and therefore in the Case of the Ideot, the Law says, *Rex habebit Custodiam*, but in the Case of *Non compos mentis*, *Rex providebit.* And as to Alienation made by *Non compos mentis*, the Words are all one as they are in the Case of the Ideot, *s. Ita quod præd' terr' & tenementa infra præd' tempus nullatenus alienen*, and therefore after the Office found thereof, the Alienation, Gift, &c. of him who is *Non compos mentis*, are in equal Case with the Alienation or Gift of an Ideot, and the said Words of the said Writ in the Register, *Quia accepimus quod I. de B. fatuus & Ideota existit, &c.* extend as well to *Non compos mentis* as to a Fool natural,

8 Co. 170. 2.

Stamf. Prærog.
34. 2.
Godb. 321.

Dyer 26. 2.

Stamf. Prærog.
36. b. 2 Sid. 124.

17 E. 2. cap. 9. 10.

F. N. B. 232. b.

for afterwards in the same Writ it is said, *Diligenter inquiras si idem I. fatuus & Ideota sit necne, & si sit, tunc utrum a natiuitate sua, an ab alio tempore, & si ab alio tempore, tunc a quo tempore & qualiter & quomodo, & si lucidis gaudet intervallis, & si idem I. in eodem statu existens terras aut tenementa aliqua alienauit necne, &c.* So that it appears that in Judgment of Law, *Fatuus & Ideota* include as well *Non compos mentis*, as *Ideota a natiuitate*, and therefore they are in the same Case, as to the Alienation of their Lands and Tenements, Goods and Chattels. *Hill. 28. H. 8. Rot. 401. in C. B.* the Case was; In Trespafs *Quare clausum fregit*, and cut his Trees in *Paddington* in the County of *Midd' per Johan' Frauncis versus Will' Holmes*, the Def. pleaded, that it was found by Office before the Escheator in the said County of *Midd'*, that the said *John Frauncis* was a Lunatick, &c. and that he was seised in Fee of the Land in which, &c. wherefore the K. seised this Person, and his Land, and by his Letters Patents granted the Rule, Custody and Government of the same Person and of his Lands to the said *Holmes*, *quamdiu* that the Person was lunatick, to take the Profits to his own Use, and so justify'd, and pray'd in Aid of the King, and thereupon it was demurred in Law, if he should have Aid or not. And it was adjudg'd, that he should not have Aid of the K. for this Grant was utterly void, for the K. is bound to keep the said Lunatick, his Wife, Children and Household, with the Profits of the Land, and without taking any thing to his own Use, but all to the Use of the *Non compos mentis* and his Family, and all this to the Intent that the K. may provide that he who wants Reason shall not alien his Lands, nor waste his Goods; and the K. after Office found, has only Provision, and has not any Custody or Posses. of the Body or Lands of one *Non compos mentis*, as he has of an Ideot, and he has nothing to grant over: But if the K. provides one to have Care and Charge that he who is *Non compos mentis*, and his Family shall be maintain'd, and that nothing shall be wasted; or if one of his own Head takes so much upon himself, in this Case he is but as Bailiff of him who is *Non compos mentis*, and shall be accountable as Bailiff to him who is *Non compos mentis*, or to his Executors or Administrators, and he can't cut down Trees but for necessary Houfēbote, Ploughbote and Cartbote, and to repair ancient Pales, and all that which a Bailiff may do he may do, and not otherwise. And therewith agrees a Writ in the Register directed to the Sheriff, *Diligenter inquiras utrum I. de B. a natiuitatis sue tempore semper hactenus purus Ideota existit, per qd' custod' terrar' & tenementor' suorum in C. ad nos debeat pertin', an per infortun' vel alio modo in hujusm' infirmitat' postea incider', propter qd' hujusm' custod' ad nos pertinere non debeat.* And so by these Differences annex'd you will understand

your

1 Anderf. 23.
Moor 4. N.
Bendl. 17, 18.
Dy. 25, 26. pl. 164

Hutt. 16.

your Books, 18 E. 2. Fines 120. 3 E. 3. Tit. Entry congeable Statbam. 3 E. 3. Formedon. — 5 E. 3. 70. 10 E. 3. Scire facias 10. and as well 32 E. 3. Scire facias 106. 17 Ass. 17. 17 E. 3. II. 25 Ass. 4. 35 Ass. 10. 50 Ass. 2. 9 H. 6. 6. 39 H. 6. 24. 12 E. 4. 8. F. N. B. 202: & Stamsf. Prærog. 34. Bract. lib. 2. fo. II, 12. & lib. 3. fo. 100. Britton fo. 66. Brooke Co. Lit. 246. b. Tit. Dum fuit infra atatem 9. and divers Writs in the Register fol. — and which are agreeable with the true Reason of the Common Law. Nota Reader, Ideota sive Ideotes is a Greek Word, and properly signifies a private Man who has not any publick Office; Apud Latinos accipitur for illiterate and simple; apud Jurisperitos nostros, Non compos mentis; Apud Anglos in common Speech, natural Fool: Fatuus prop' dic' a fando, quia fatur qd' puer primo fatur, id est, quia ineptie loquitur; sed apud Jurisperitos nostros accip' pro Non comp' mentis, & fatuus Co. Lit. 246. b. dic' qui omnino despit: Stultus dicitur a stupore, quia stultus est qui propter stuporem movetur; levius est esse stultum quam fatuum, s. imprudens, improvidus, ignorans mali & boni. Insanus qui abjecta ratione omnia cum impetu & furore facit. Amens, ab (a) que est particula privativa, & mente, id est consilio & animo. Demens, est qui non cogitat quid agit aut loquitur, (de) est particula privativa: Amens qui prorsus insanit; Arist. 7. Ethicorum, Amentes dicuntur qui a natura experti rationis solum sensuum munus exequentur.

F I N I S

Casuum istius Libri series:

		Fol.
1	V ernon's Case.	<i>Mich.</i> 14 & 15 <i>Eliz.</i> 1
2	Bevil's Case.	<i>Mich.</i> 17 & 18 <i>El.</i> 8
3	<i>Actiões de Scandalis</i> , or A- ctions for Slander.	<i>Trin.</i> 20 <i>El.</i> 12
4	Copyhold Cafes.	<i>Mich.</i> 23 & 24 <i>El.</i> 21
5	Mitton's Case.	<i>Pasch.</i> 26 <i>El.</i> 32
6	Bozoun's Case.	<i>Mich.</i> 26 & 27 <i>El.</i> 34
7	Tyrringham's Case.	<i>Mich.</i> 26 & 27 <i>El.</i> 36
8	Cafes of Appeals and Indictments.	<i>Hill.</i> 28 <i>El.</i> 39
9	Andrew Ognel's Case.	<i>Hill.</i> 29 <i>El.</i> 48
10	Rawlins's Case.	<i>Mich.</i> 29 & 30 <i>El.</i> 52
11	The Case of the Wardens of Com- minality of Sadlers.	<i>Trin.</i> 30 <i>El.</i> 54
12	Force and Hembling's Case:	<i>Mich.</i> 30 & 31 <i>El.</i> 60
13	Herlakenden's Case:	<i>Pasch.</i> 31 <i>El.</i> 62
14	Fulwood's Case.	<i>Hill.</i> 33 <i>El.</i> 64
15	Hind's Case.	<i>Trin.</i> 33 <i>El.</i> 70
16	Boroughes's Case.	<i>Pasch.</i> 3 ⁸ <i>El.</i> 72
17	Palmer's Case.	<i>Hill.</i> 39 <i>El.</i> 74
18	Holland's Case.	<i>Trin.</i> 39 <i>El.</i> 75
19	Cafes of Corporations.	<i>Mich.</i> 40 & 41 <i>El.</i> 77
20	Digby's Case.	<i>Hill.</i> 41 <i>El.</i> 78
21	Nokes's Case:	<i>Trin.</i> 41 <i>El.</i> 80
22	Sir Andrew Corbet's Case:	<i>Mich.</i> 41 & 42 <i>El.</i> 81
23	Southcote's Case.	<i>Pasch.</i> 43 <i>El.</i> 83
24	Luttrel's Case.	<i>Pasch.</i> 43 <i>El.</i> 86
25	Drury's Case.	<i>Trin.</i> 43 <i>El.</i> 89
26	Slade's Case.	<i>Trin.</i> 44 <i>El.</i> 92
27	Adams and Lambert's Case:	<i>Mich.</i> 44 & 45 <i>El.</i> 104
28	Aeton's Case.	<i>Hill.</i> 45 <i>El.</i> 117
29	Dumpport's Case.	<i>Hill.</i> 45 <i>El.</i> 119
30	Bustard's Case.	<i>Pasch.</i> 1 <i>Jac. Regis</i> 121
31	Beverley's Case of <i>Non compos</i> <i>mentis.</i>	<i>Pasch.</i> 1 <i>Jac. Reg.</i> 123